W. L. L.
June 5. 1847 From the Author Nov. 22 #
132

A TREATISE

ON THE LAW OF

HOMICIDE,

AND OF

LARCENY AT COMMON LAW.

HARVARD LAW SCHOOL

By ROBERT BEVILL,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

LONDON:

PRINTED FOR W. CLARKE AND SON, PORTUGAL-STREET, LINCOLN'S-INN.

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A

TREATISE

ON THE LAW OF

HOMICIDE

AND OF

Rec. July 12, 1847

PREFACE.

I HAVE, for ſeveral years, been preparing a Treatiſe, which was intended to contain the Law upon all the Offences uſually tried at the Aſſizes; but to complete it in ſuch a manner as would be ſatisfactory to myſelf, requires more time and conſideration than I at firſt apprehended; and I am now undetermined whether I ſhall go on with it or not.

The following pages were written as a part of that work; and as they relate to two offences, upon which there are many points that have been but inaccurately ſtated,

ſtated, and many which are ſtill open to litigation, I am induced to think that they will be in ſome degree uſeful. I have collected every thing to be found in the books which appeared to be material; and I have endeavoured to extract all the principles by which the law, as to theſe offences, is governed: and although no direct authority can be cited in ſupport of ſome of theſe principles, in the form in which I have ſtated them, yet when every part of the ſubject is examined, I feel ſome confidence, that they will be found correct. I have given a diſtinct explanation of the law upon Manſlaughter, in all its branches: this, I believe, has not been hitherto attempted: and as far as depends upon the law, I truſt that I have ſucceeded in explaining the preciſe diſtinctions between that offence and Murder.

The

The greater part of the references are made to Sir Matthew Hale's Hiſtory of the Pleas of the Crown, and to the Pleas of the Crown by Mr. Serjeant Hawkins, becauſe they in general contain all that has hitherto been defined upon the points for which thoſe references are made.

ROBERT BEVILL.

LINCOLN'S INN,
No. 1. OLD SQUARE,
DEC. 10, 1798.

A

TABLE OF THE CASES.

	Page
Mary Adey's case	200
Aickles' case	269
Baker's case	183
Bass' case	256
Case of Borthwick and others	209
Brain's case	44
Broadfoot's case	207
Brown's case	82
Buckner's case	79
Burton's case	58
Calfield's case	184
Sir Matthew Cary's case	124
Sir John Chichester's case	61
Chissers' case	264
Cockwaine's case	266
Cook's case	187
Cooper's case	98
Copston's case	96
Coslet's case	232
Curtis' case	173
Ann Davis' case	227

	Page
Sir Henry Ferrers' case	186
Ford's case	70
Francis' case	42
Agnes Gore's case	9
Gough's case	131
Grey's case	52
Halloway's case	45
Harcourt's case	68
Hugget's case	193
Huggin's case	135
Hull's case	90
Jackson's case	164
Keate's case	52
Kirk and Cage's case	111
Lad's case	26
Lavender's case	257
Levetts' case	89
Mackalley's case	180
Case of Macdaniel and others,	18
Maddy's case	76
Sir Richard Mansfield's case	15
Martin's case	282
Mason's case	81
Mawgridge's case	107
Morgan's case	106

	Page
Naylor's case	65
Newman's case	221
Oneby's case	103
Patch's case	268
Pear's case	262
Pew's case	181
Phillips' case	202
Rampton's case	59
Mary Raven's case	245
Reason and Tranter's case	129
Rogers' case	182
Rowley's case	73
Case of Salisbury and others	11
Saunders' case	16
Sears' case	241
Self's case	5
Semple's case	263
Sharpless and Greatrix's case	264
Skutt's case	256
Snow's case	84
Stedman's case	80
Stevenson's case	189
Taverner's case	101
Taylor's case	81
Tomson's case	79
Tooley's case	195
Tunnard's case	260

Page

Turner's case - - - - - 76

Vicars' case - - - 246

Watson's case - - - 253
Ward's case - - - 222
Westbeer's case - - - 280
Wilkins' case - - - 267
Williams' case - - - 220
Wynne's case - - - 238

A man beat a woman, and she did not die until after a year and a day - - - 4

A woman left her child in an orchard, and it was killed by a hawk - - ib.

Two constables kept removing a child from parish to parish until it was killed by the cold - 5

A woman left her child in a hog-stye, and it was destroyed by a sow - - - ib.

A man and his wife agreed to poison themselves; they both drank poison, but it killed the husband only - - - - 9

A woman who was parted from her husband sent him some poison as a medicine, and it killed him 12

A husband found a man in the act of adultery with his wife, and killed him - - - 29

Two persons playing at tables, quarrelled and one of them killed the other - - - 46

A man who was provoked by what a woman had said, threw a broomstick at her, and killed her ib.

Two

Page

Two men were beating one; a ſtranger ſaid it was a ſhame, and one of the two men immediately killed him - - - 47

A man and his wife quarrelled, and he ſtruck her with a peſtle and killed her - - - 51

A ſmith was angry with his ſervant, and he ran a red-hot iron into his belly - - - ib.

A woman kicked her child, and ſtamped upon its belly, and killed it - - - ib.

A maſter ſtruck his apprentice with a great ſtaff, and it killed him - - - 52

A man throwing at a cock at Shrove-tide, killed a child who was looking on - - - 59

One man killed another in his own defence, when he might have ſaved himſelf by running away 64

One man killed another in his own defence, when he was not in danger - - - ib.

Several perſons killed a man in defence of a houſe when they had no right to defend it - 69

A ſervant ſhooting at a deer killed his maſter - 89

A man pulled the trigger of a gun without knowing that it was charged, and it went off and killed his wife - - - - 91

One man killed another in his own defence - 95

A ſimilar caſe - - - - 96

A boy killed a thief in defence of a houſe - 98

Several men came to burn a houſe and the owner killed one of them - - - - ib.

A con-

Page

A conſtable killed a felon in his attempt to apprehend him - - - - 117

A private perſon killed a murderer to prevent his eſcaping - - - - 121

A thief killed a merchant, and the merchant's boy killed the thief - - - 122

Two men were fighting, and a third perſon killed one of them in defence of the other - 124

A gaoler was attacked by his priſoners, and he killed two of them - - - 133

A gaoler was jealous of one of his priſoners and killed him - - - - 134

A conſtable went with ſeveral aſſiſtants to execute a warrant, and one of his aſſiſtants was killed 172

A bailiff came into a man's chamber before he was up to arreſt him, without mentioning his buſineſs, and he killed the bailiff - - - 185

A ſervant killed his maſter after he had left his ſervice; and was guilty of petit treaſon 214

A gueſt in an inn got up in the night and ſtole the coverlid and ſheets that were upon his bed 232

A man got into a waggon, and was apprehended in the act of cutting open a parcel to ſteal out the goods - - - - 234

A man intending to ſteal ſome cows, brought a replevin, and got the cows into his poſſeſſion and ſold them - - - - 236

A carrier ſtole ſome goods delivered to him to carry 251

A ſilk

Page

A silk-weaver employed some men in his house, and he delivered some silk to one of them to work up and he stole it - - - 256

A man ordered a silversmith to send a pair of silver candlesticks to his lodgings, and he stole them 264

A man stole six boxes of charters and muniments relating to land - - - 280

A man milked a cow and stole the milk - 282

A man stole some young pigeons out of a dove-cote 286

A man stole some peacocks - - 287

HOMICIDE.

WHEN one man kills another it is Homicide; and, except in caſes of high treaſon, the law which relates to it is ſtated under the following diviſions.

Murder.

Manſlaughter.

Homicide *per infortunium.*

Homicide *ſe defendendo.*

Homicide in duelling and fighting.

Homicide when committed by an officer of juſtice.

Homicide when the perſon killed is an officer of juſtice.

Homicide when committed by a perſon engaged in the impreſs ſervice.

Homicide when the perſon killed is engaged in the impreſs ſervice.

Petit treaſon.

Statute of ſtabbing.

Act to prevent the deſtroying and murdering of baſtard children.

I have placed murder firſt, becauſe the law as to all the other kinds of homicide may be conſidered as exceptions to the rules by which murder is governed. The law of duelling and fighting, and of homicide, as to perſons engaged upon the public ſervice, is placed in ſeparate diviſions, becauſe it makes the diſtinction between the different branches of homicide more explicit. I have not adopted the uſual diviſion between excuſable and juſtifiable homicide; becauſe homicide, which was formerly conſidered as merely excuſable, is now in effect put upon the ſame footing as if it were juſtifiable: and

and I have not given a ſeparate place to the rules as to juſtifiable homicide in the execution of the law, becauſe they entirely belong to the diviſion which relates to homicide when committed by an officer of juſtice.

1. When a man is indicted for homicide, the firſt fact to be aſcertained is, whether the perſon who is dead were killed by the perſon indicted: and if it be found that the death was occaſioned by the perſon indicted, and that it happened within a year and a day from the time the injury was received, it is imputed to him, *in whatever manner it was occaſioned.* But if one perſon receive a perſonal injury from another, and it do not kill him until after a year and a day from the time it was received, it is a rule in law that his death cannot then be attributed to the perſon by whom the injury was occaſioned. In computing the time the whole of the day on which the injury was received is to be included: if a blow be given on the firſt day of January, the year cloſes on the laſt day of December, and if the perſon who received the blow do not die before

the ſecond day of January, the perſon who gave it is as free from puniſhment as if it had been a natural death[a]. —— If there be a riot or an affray, and any perſon be killed in conſequence of it, and it cannot be diſcovered who killed him, the perſon who began the riot or the affray is conſidered as the cauſe of the death, and it is therefore imputed to him[b].

A man beat a woman, and after the year and the day ſhe died in conſequence of the injury ſhe had received; and becauſe ſhe died after the year and a day, the man was acquitted. 3 Edw. 3[c].

A woman left her child in an orchard with an intent to deſtroy it. A hawk ſtruck it with its talons, and in a ſhort time after the child died in conſequence of the wounds it had received. The woman was indicted for murder, found guilty, and executed. 2Eliz[d].

[a] 1 Hale, 39, 428, 431, 432. 1 Haw. 185, 186. 3 Inſt. 53.
[b] 1 Salk. 334.
[c] Fitz. Coro. 303.
[d] Crom. 24. Sect. 44.

The

The conſtable of one pariſh carried a baſtard child into another, and the conſtable of that pariſh carried it back again; to avoid the charge of maintaining it, the two conſtables continued carrying it backwards and forwards in this manner, until it was killed by the cold: and it was held that they were guilty of murder. Cited 4 Car[e].

A baſtard child was carried by its mother and hid in a hog-ſtye, a ſow came and deſtroyed it; and for this offence the mother was found guilty of murder and executed. Her intent is not ſtated; but it could not have received this conſtruction, unleſs ſhe had left the child in the ſtye with an intent to deſtroy it. Cited 4 Car[e].

Stephen Self's caſe.

An apprentice was ſent to Bridewell on the twenty-fifth of December, 1775, and was brought back to his maſter's on the ninth of January, following. He afterwards underwent a ſeries of very rigorous and cruel uſage from his maſter; he had very bad chilblains, which were neglected; a mortifica-

[e] Palm. 548.

[f] Palm. 548.

tion

tion took place in his legs, and he died on the twenty-ſecond. The maſter was tried at the Old Bailey in February, 1776, for murder; and the jury doubting whether his conduct had been the cauſe of the death of the apprentice, found him guilty of manſlaughter. The court doubted the propriety of the verdict, but they received it. The caſe was afterwards referred; and upon the reference "the judges were clearly of opi-"nion that there was no ground for the ver-"dict; for that it was either murder or no "offence at all: but as the jury had thought "proper to find it manſlaughter, they would "not meddle with it[g]."

2. If one man wound another, or do any other injury to his perſon, and in conſequence of its being neglected, or for want of aſſiſtance, it kill him, his death is imputed to the perſon who gave the wound[h]. It is ſaid that there is a diſtinction between caſes in which the death is occaſioned by improper applications, and when it is occa-

[g] Caſes, C. L. 127. O. B. Seſſions Papers, 1776, p. 180.

[h] 1 Haw. 186. Rew's caſe. Kel. 26.

ſioned

ſioned by neglect or for want of aſſiſtance[1]. But in caſe of neglect the wound is the cauſe of the death; for if he had not been wounded the neglect would not have been ſuffered: and in caſe of improper applications, the wound is alſo the cauſe of the death; for if he had not been wounded the improper applications would not have been made. Both caſes are, as I conceive, thus ſubject to the ſame conſtruction; and I therefore think that when the death is occaſioned by improper applications, it is to be imputed to the perſon who gave the wound, in the ſame manner as if it had been occaſioned by neglect.

3. When a man is made the inſtrument by which a deſign againſt himſelf is carried into execution, and it occaſions his death, the offence is ſubject to the ſame conſtruction as if the offender had committed it with his own hand. It generally happens when a man is poiſoned that he takes it himſelf, but the poiſon is the cauſe of his death, and it is therefore imputed to the

[1] 1 Hale, 428.

perſon

perſon who occaſions it to be taken[k]. If a man who has the uſe of his mental powers be weary of his life, and any perſon adviſe him to deſtroy himſelf, and he do deſtroy himſelf, it cannot be aſcertained with certainty that he acted in conſequence of that advice; he might have formed the reſolution before it was given; and I therefore think that his death cannot be imputed to the perſon giving it. But if a madman who is incapable of diſcriminating between what is dangerous and what is not, be induced to kill himſelf, the offence is committed by the perſon who induces him; for the madman is then made the inſtrument by which the deſign againſt himſelf is carried into execution[l]. If a man by exciting fear or grief, or by producing ſome other effect upon the mind of any perſon, appear to occaſion his death, it is impoſſible to aſcertain with certainty that he died in conſequenee of this effect, and it therefore cannot be homicide[m].

[k] 1 Hale, 431. 1 Haw. 195. Vaux's caſe. 4 Co. 44. Saunders' caſe. Sec. 6. poſt.

[l] 1 Haw. 185.

[m] 1 Hale, 429.

A man who had waſted his property, and was in diſtreſs, told his wife, with whom he had lived a long time, that he was weary of his life, and would put an end to it; and his wife ſaid that ſhe would die with him. The huſband then aſked her to go and buy ſome ratſbane, and ſaid "we will drink it "together;" and ſhe accordingly went and bought it, and put it into ſome liquid, and they both drank it. The huſband was poiſoned, but the wife recovered. She was tried at Newgate, 1604, for the murder of the huſband, and a ſpecial verdict was found; but it is not ſtated how it was decided. It was the voluntary act of the huſband: the wife does not appear to have had any deſign againſt the huſband; I do not conceive how it can be ſaid *that ſhe killed him*; and I therefore think that if ſuch a caſe were to occur now it would not be murder nor any other kind of homicide[n].

Agnes Gore's caſe.

A preſcription for an electuary was carried to an apothecary, who made it up, and ſent it to the patient. The wife of the patient

[n] Moore, 754.

put

put ſome ratſbane into it to poiſon him. He took part of the electuary, and it made him extremely ſick; it was taſted by ſeveral other perſons, and it had the ſame effect; but it did not kill any of them. The remaining part of it was then carried to the phyſician by whom the preſcription was written; and upon being informed of the effect it had produced, he ſent for the apothecary. The apothecary came, and to convince them that he had put nothing into it which he himſelf was unwilling to eat, he ſtirred up the electuary, eat part of it, and was killed by the poiſon. The wife of the patient was tried upon the weſtern circuit, 9 Ja. 1. and, as it was probable that it would not have killed the apothecary if he had not ſtirred it up, the caſe was referred to the judges; but it was reſolved by all of them that ſhe was guilty of murder*.

4. When A makes B the inſtrument by which he occaſions the death of C, A is conſidered as the real perpetrator of the offence. If one man intend to poiſon ano-

* 9 Co. 81.

ther,

ther, and a third perſon, without knowing it adminiſter the poiſon,—if A induce a madman to kill any perſon,—or if A have a ſword in his hand, and B by ſurprize ſeize his hand with the ſword in it, and inſtantly kill ſome other perſon who is ſtanding near, the death is imputed to the perſon who thus occaſions it. The perſon who is made the inſtrument may ſometimes be criminal; but ſtill the offence of the perſon who is the cauſe of it, is the ſame as if he had been the ſole offender[p].

Several perſons formed a deſign to murder Doctor Ellis, and they attacked him when his ſervants were with him, and a combat enſued. Whilſt they were fighting, a man who knew nothing of the deſign joined in the affray, and one of Doctor Ellis's ſervants was killed by the blows he received from this man and from the conſpirators. They were all tried at Salop, 1 Mar. and it was held that the conſpirators were guilty of murder; and that the man who joined them was guilty of man-

Caſe of Saliſbury and others.

[p] 1 Hale, 431, 434, 617. 1 Haw. 185.

ſlaughter

ſlaughter only. On the part of this man it was a ſudden offence, he did not commit it from malice, and it therefore could not amount to murder[r].

A woman eloped from her huſband, and lived with another man. She had two daughters by her huſband, and they lived with him. One of the daughters went to ſee her mother, and when ſhe was there, the mother aſked how her father did; and upon being informed that he had a cold, ſhe ſaid, "here is a good powder for him, "give it him in his poſſet." The daughter received the powder, which was poiſon, and took it home. She told what her mother had ſaid, and when ſhe was abſent the other daughter put the powder into a poſſet, and gave it to her father, and it occaſioned his death. The mother was tried at Hereford; the caſe was referred to the judges, and upon the reference it was held to be murder. The two daughters had no reaſon to ſuppoſe that it was poiſon, and they were therefore entirely innocent. Cited as a caſe which had lately occurred. 9 Car. 1[s].

[r] Plowd. 100. [s] Kel. 53.

5. If one man unjuſtly occaſion the death of another by procuring him to be executed under the ſentence of the law, it is ſubject to the ſame conſtruction as if he had killed him in any other manner[t]. If the death of a man were to be occaſioned by bearing falſe witneſs againſt him, it appears to admit of doubt whether it would be murder. It is expreſsly ſtated, that when Lord Coke wrote it was held that ſuch an offence was not murder; but ſince that time I find no direct opinion upon the ſubject[v]. Several perſons formed a conſpiracy to procure a robbery to be committed, and to get the robbers convicted, for the purpoſe of obtaining the reward which is given for apprehending robbers*. The robbery was committed by a man of the name of Kidden, who knew nothing of their deſign; and up-

Macdaniel, Berry, and Jones' caſe.

[t] 1 Hale, 497. 1 Haw. 169.
[v] 3 Inſt. 48.

* The particular plan of the conſpiracy is not ſtated, but it is ſaid to be of the ſame deſcription as the plan reported in another caſe. In that caſe there were ſeveral conſpirators; one of them perſuaded two men who knew nothing of the deſign, to go to a particular place to commit robbery; another of the conſpirators went to that place to be robbed; and then theſe two men aſſaulted him, and took from him ſome money, and ſome other property. Caſe of M'Daniel and others. Foſt. 121.

on

on the evidence of two of the conſpirators Kidden was convicted and executed. The circumſtances were afterwards diſcovered, and the conſpirators were indicted for murder, and tried at the Old Bailey in June, 1756. They were found guilty, and judgment was immediately reſpited, that it might be more fully conſidered upon a motion in arreſt of judgment: but the Attorney General declined to argue it, and at a ſubſequent ſeſſions the conſpirators were diſcharged[w]. If however a caſe ſhould occur, in which it can be clearly aſcertained that the conviction is occaſioned by the perjury, I think it would be murder: for it is an invariable principle, that the death of a perſon is always to be imputed to him who is the cauſe of it. But there are ſome caſes in which it is impoſſible to aſcertain with certainty, whether the conviction were occaſioned by the perjury or not; ſome circumſtances may be proved which are in fact true, and which have no connection with the perjury; it is poſſible that the jury may give their verdict upon the evidence of theſe

[w] Foſt. 131. Caſes C. L. 39. 4 Black. 196.

facts

facts; and I therefore think that in all cases of this kind, the death of the person convicted cannot be imputed to the person guilty of the perjury, and his offence consequently cannot be murder. Kidden went out to commit a robbery, and he took away some property; the jury might have founded their verdict upon these facts; it is impossible to know with certainty that the perjury was the cause of the conviction; and I therefore think that the conspirators were not guilty of murder.

6. If a man intending to kill or to hurt B, by accident kill C, the offence is the same as if he had killed B. If for instance one man lie in wait to kill another, and mistaking a stranger who is passing by to be the person for whom he lies in wait, kill the stranger, it is murder: the malice *egreditur personam*; and the mistake is no excuse[x].

Sir Richard Mansfield's case.

Sir Richard Mansfield and Mr. Herbert quarrelled and challenged each other. Her-

[x] 1 Hale, 39, 431, 438, 446. 1 Haw. 185, 195, Foſt. 261.

bert

bert went with his ſervants to Sir Richard's houſe to fight with him; and whilſt a woman, who was aunt to both of them, was perſuading them not to fight, one of Sir Richard's ſervants threw a ſtone at Herbert and his ſervants, and it by accident killed this woman: and it was held to be murder, in conſequence of the malice they had againſt Herbert. It happened in the reign of Queen Mary[y].

Saunders' caſe. A man gave his wife a poiſoned apple to kill her, that he might marry another woman. She eat part of it, and gave part of it to her daughter; but the mother recovered, and the daughter died. He had great affection for his daughter; he was preſent when ſhe eat part of it; but he was fearful that he might be detected, and he therefore did not offer to take it from her. He was tried at the aſſizes for Warwick, 15 Eliz. and it was held that he was guilty of murder[z].

7. The lives of all perſons, foreigners as well as ſubjects, are equally under the

[y] Moore, 87. [z] Plowd. 474.

protection

protection of the law: and if a foreigner be killed, it is ſubject to the ſame conſtruction as if he were an Engliſhman. —— If a perſon be killed who is at the point of death, or afflicted with a fatal diſeaſe, it is ſubject to the ſame conſtruction as if he were in health. —— If a man be an outlaw, or if he be attainted on a *præmunire*, or of felony, yet no one is juſtified in killing him, except in the execution of the law. —— If a child be born alive, and it be killed afterwards; or if it be born alive, and it afterwards die in conſequence of an injury received before its birth, it is murder, or ſome other kind of homicide, according to the circumſtances of the caſe: but a child before its birth is not conſidered as a *perſon* within the protection of the law; it is not *in rerum natura*; and therefore the killing of it cannot be homicide[a].

[a] 1 Hale, 428, 433, 497. c. 1. ſ. 21.
1 Haw. 169, 188. 5 Eliz.

MURDER.

WHEN one man kills another from malice,* it is Murder; and the offender is puniſhed with death without the benefit of clergy.

Malice is uſed to deſcribe the intent with which the offence is committed; and as it cannot be murder, unleſs there be an intent to kill or to hurt the perſon of another, and unleſs this intent be both felonious and deliberate, I think it is evident that malice means, a felonious and deliberate intent to kill or to hurt the perſon of another. I ſhall therefore endeavour to ſhew,

Firſt, When there is an intent to kill or to hurt the perſon of another.

* I have not added either prepenſe, aforethought, premeditated, or deliberate, becauſe it is evident that malice of itſelf compriſes all the meaning theſe words can be intended to convey. 1 Hale, 451. Kel. 127.

Secondly,

Secondly, When this intent is felonious. And,

Thirdly, When it is deliberate.

It is however to be always obſerved, that the offence of killing a man cannot be murder, unleſs it be committed from malice: and that it cannot be committed from malice, if any one of theſe three circumſtances be wanting.

Of the intent to kill or to hurt the perſon of another.

1. When one man actually intends to kill, or to hurt the perſon of another, the circumſtances under which the offence is committed always ſhew his intent; and if it be felonious and deliberate, the offence is committed from malice, and it is murder[b]. When one man intends to hurt the perſon of another only, however ſlight the injury, yet if it be felonious and deliberate, and occaſion death, it is ſtill ſubject to the ſame

[b] 1 Hale, 39, 472. 1 Haw. 178, 194. Foſt. 259.

conſtruction; and no circumſtances, however favourable, can mitigate the offence.

2. If a man intend to do any unlawful act which is *malum in ſe*, and there be any probability that it will occaſion death, or a perſonal injury to any one, the offender is anſwerable for all the conſequences; becauſe he ought to have foreſeen and refrained from laying the foundation for them. In law, an intent to commit an act of this kind, includes an intent to kill or to hurt the perſon of another; and if in carrying it into execution any man be killed by accident, the offence is the ſame as if there had been an actual intent to kill, or to do him a perſonal injury. But if the act intended be lawful,—if it be unlawful, and not *malum in ſe*, but *malum prohibitum* only,—or if it be unlawful, and *malum in ſe*, and there be no probability that it will occaſion death, or a perſonal injury,—one of the circumſtances neceſſary to conſtitute malice is wanting, for there is no intent to kill or to hurt the perſon of another, and therefore the offence cannot be murder[c].

[c] 1 Hale, 39. 475. 1 Haw. 178. Foſt. 258, 259. Kel. 117.

If

If a man give any thing to a woman with child to procure an abortion, and it kill her,—if a man who is driving a cart ſee a child in the way, and he drive on and kill the child,—if a man wilfully let looſe a wild beaſt, or any other animal that is dangerous,—if he take a horſe into a crowd which is accuſtomed to kick,—if he diſcharge a gun among a multitude of people,—or if he throw a great ſtone, or a large piece of timber, into a ſtreet where people are paſſing at the time,—and in conſequence of ſuch act any perſon is killed, the offender is guilty of murder: and whether it be intended againſt any particular perſon, or againſt mankind in general, it is equally ſubject to the ſame conſtruction. If the offender actually intend to kill or to hurt, the offence falls within the laſt ſection: but if he intend to alarm them, or to make ſport only, yet there is always ſome probability that ſuch acts will occaſion death or a perſonal injury; an intent to commit any of theſe acts, in law, implies an intent to kill or to hurt the perſon of another, it is felonious and deliberate, and it conſequently contains all the requiſites neceſſary to conſtitute

ſtitute malice[d]. —— If one man hunt in another's park without a licence, and in ſhooting at a deer the arrow glance againſt a tree and kill a byeſtander, the act he intends to commit is unlawful and *malum in ſe*; yet the want of the probability that the act intended will occaſion death or a perſonal injury to any one, prevents the offence from being murder, and it is manſlaughter only[e]. —— But in all the inſtances above ſtated, it is the exiſtence of this probability that makes them amount to murder: and although I have not found any authority which directly ſtates, that to make caſes of this kind amount to that offence there muſt be this probability, yet the above inſtances are, as I conceive, ſufficient to ſhew that this is the law. When one act occaſions another, and there is any probability that it will occaſion it, there is a reaſonable cauſe to imply that there was an intent to commit the act which follows: but if a man intend to do one act, and he by accident do another which has no connection with the act intended, and is wholly

[d] 1 Hale, 429, 430, 431, 475, 476. 1 Haw. 200. Foſt. 263. 4 Black. 200.
[e] 1 Hale, 475.

different,

different, it cannot be implied that he intended to commit this act.

The different circumstances under which the same kind of act may be committed, will sometimes make it dangerous and sometimes not; but it is only when it is likely to occasion death or a personal injury, that the offence is subject to the above construction. If a man, to make sport, throw a stone over a wall where many people are passing, and it by accident kill any person, and it be not such a stone as falls within this description, the intent to make sport cannot imply an intent to kill or to hurt the person of any one, and the offence is manslaughter only[f].

Sir Michael Foster says, that if the offence "be done in prosecution of a felonious intention it will be murder, but if 'the intent went no farther than to commit a bare trespass, manslaughter[g]." But this cannot, as I conceive, be correct; for there are some instances in which the acts intended are not of themselves more

[f] 1 Hale, 475. [g] Fost. 258.

criminal

criminal than a bare treſpaſs; and as in theſe inſtances the offence is murder, it appears to me that there is ſufficient authority for ſtating, that whether the act intended be a felony or a treſpaſs, the offence is equally ſubject to the above rule. —— The diſtinction between murder and manſlaughter in caſes of this kind, appears to me to depend wholly upon the probability that the act intended will occaſion death or a perſonal injury to any one: if there be this probability the offence is murder; but if not, it is manſlaughter only[h]. —— When a man goes out to commit a felony, and there is any probability that it will occaſion death or a perſonal injury, and any man is unintentionally killed, the offender is undoubtedly guilty of murder. If, for inſtance, a man, in the day, ſhoot at a deer near a hedge to ſteal it, and he by accident kill a man who is paſſing along a public road on the other ſide, there is ſome probability that the ſhooting in ſuch a place will occaſion ſuch an act; the intent to kill the deer, in law, implies an intent to kill or to hurt

[h] Manſlaughter, Div. 1. Sect. 1.

the

the perſon of any man who may be near; the act intended is felonious and deliberate; the offence is therefore committed from malice, and it is murder. —— *It is ſaid*, that if a man ſhoot at a deer to ſteal it, and the arrow glance againſt a tree and kill a boy concealed in a buſh[i],—or if one man ſhoot at another's poultry to ſteal any of them, and by accident kill a man[k],—that he is guilty of murder: it is alſo ſtated, as a general rule, that if a man intend to commit a felony, and he by accident kill any perſon, that he is guilty of murder[l]: and the probability that it will occaſion death or a perſonal injury is wholly unnoticed: but a ſlight recurrence to firſt principles will, as I conceive, be ſufficient to authoriſe the diſtinction which is founded upon this probability. No offence can amount to murder unleſs it be committed from malice: and to conſtitute malice, to uſe the words of Sir Matthew Hale, there "muſt be a compaſſing or "deſigning to do ſome bodily harm[m]." If a man go out to commit a felony of ſuch a deſcription that no accident is likely to hap-

[i] 3 Inſt. 56.
[k] Poſt. 258, 259.
[l] 1 Haw. 178.
[m] 1 Hale, 451.

pen

pen which can occaſion death or a perſonal injury to any one, and in the commiſſion of this felony he by accident do kill a man, yet it cannot be ſaid that the intent to commit the felony includes an intent to kill this man; I do not conceive how it can be implied, that there was a compaſſing or deſigning to do ſome bodily harm; for there was no probability that ſuch an event would happen: and I therefore think that the offence is not committed from malice; and that it is manſlaughter, not murder. —— When a man intends to commit a felony, and in carrying this intent into execution he kills any perſon, there will generally be an actual intent to kill or to hurt him, and in ſuch caſes the offence falls within the laſt ſection.

Lad's caſe. A man committed a rape ſeveral times upon a girl of nine years of age; it occaſioned a mortification and killed her. He was tried at the ſummer aſſizes at Maidſtone, 1773, and found guilty of murder; the judgment was reſpited, and the caſe referred to the judges; but as the indictment was found to be defective, there was no deciſion

ciſion as to the caſe itſelf[n]. The circumſtances ſtated in the report are not ſufficient to enable me to form an opinion upon it. In moſt caſes the act of committing a rape cannot imply a "compaſſing or deſigning to do "ſome bodily harm;" there is then no probability that it will occaſion death or a perſonal injury, and therefore under the above rule it cannot be murder: but if, from the circumſtances under which it is committed, there be any probability of this kind, then I think the law will imply that there was an intent to kill or to hurt the perſon of another; and as ſuch an offence will be both felonious and deliberate, it will then be committed from malice, and the offender will be guilty of murder.

When the intent is felonious.

In all caſes of homicide, the word felonious is uſed to diſtinguiſh thoſe caſes which are criminal from thoſe which are not;[o] and in deciding whether the intent with

[n] Caſes C. L. 91. [o] 4 Black. 188.

which

which the offence is committed be felonious or not, it is only neceſſary to decide whether it be unjuſt. There are many caſes where the diſtinction between what is juſt and what is unjuſt may admit of doubt: but as applied to homicide, the common ideas of right and wrong are, in almoſt all caſes, ſufficient to enable us to decide. —— If one man put another to death at his own requeſt, it is unjuſt to comply with ſuch a requeſt, his intent in killing him is therefore felonious, and the offence is the ſame as if he had killed him againſt his will[p].

When the intent is deliberate.

1. All that is required to make the intent deliberate is, that the offender have an opportunity to recollect the nature of the offence he intends to perpetrate. If one man have a ſettled deſign to put another to death, —if a man procure poiſon, and afterwards give it to any perſon to poiſon him,—if one man lie in wait to kill another,—if he arm himſelf for that purpoſe,—or if one man

[p] 1 Haw. 165.

expreſs

expreſs a determination to kill another,—and he carry his intent into execution, he could not have committed an offence of this kind unleſs he had actually intended either to kill or to hurt; this intent is felonious; it is evidently deliberate; and thus all the requiſites neceſſary to conſtitute malice are completed, and the offender is guilty of murder[q].

A man being informed of a perſon's familiarity with his wife, ſaid he would be revenged upon him. The huſband afterwards found this perſon in the act of adultery with his wife, and immediately killed him: and it was held by the court that as the huſband had ſaid that he would be revenged upon him, he was guilty of murder. Cited in Maddy's caſe. 23 Car. 2[r].

2. When one man kills another, and in doing it adopts ſome artifice that the offence may not appear to be murder; the artifice is of itſelf proof that the intent with which the offence is committed is deliberate: and al-

[q] 1 Hale, 451. 1 Haw. 189. [r] 1 Vent. 158.

though

though circumſtances may occur, in conſequence of the contrivance of the offender, by which ſome degree of blame may be imputed to the perſon killed, yet, as theſe circumſtances are occaſioned by the offender himſelf, they do not excuſe his criminality[s]. —— If A intending to kill B deſire him to take a pin out of his ſleeve, that by making A the aggreſſor it may appear to be a ſudden offence, it is an artifice which ſhews that his intent againſt B is deliberate; and although he do take the pin out of his ſleeve, and A immediately ſtrike and kill B, the taking of the pin is no excuſe, the offence is committed from malice, and it is murder[t]. —— If A and B quarrel, and A ſay that he will not ſtrike B, but that he will give B a pot of beer to ſtrike him firſt, and he make this offer that by procuring B to ſtrike firſt he may have an excuſe for killing him, yet this alſo is an artifice which ſhews that his intent againſt B is deliberate; and if B give him a blow, and then A immediately kill him, in this caſe alſo the offence is committed from malice, and it is murder,

[s] 1 Hale, 452. 1 Haw. 168. Foſt. 277.

[t] 1 Hale, 457.

in

in the ſame manner as if he had killed B without having received the blow[v].

Richard Maſon was tried at Wincheſter Summer Aſſizes, 1756, for the murder of William Maſon his brother. He was found guilty, but his execution was reſpited, that the opinion of the judges might be taken. Richard Maſon's caſe.

" The priſoner, with the deceaſed and an-
" other brother, and ſome neighbours, were
" drinking in a friendly manner at a public
" houſe; till growing warm in liquor, but
" not intoxicated, the priſoner and the de-
" ceaſed began in idle ſport to pull and
" puſh each other about the room. They
" then wreſtled one fall, and ſoon afterwards
" played at cudgels by agreement. All this
" time no tokens of anger appeared on ei-
" ther ſide, till the priſoner in the cudgel
" play gave the deceaſed a ſmart blow on
" the temple. The deceaſed thereupon grew
" angry, and throwing away his cudgel
" cloſed in with the priſoner, and they
" fought a ſhort ſpace in good earneſt: but
" the company interpoſing they were ſoon
" parted. The priſoner then quitted the

[v] Hale's Sum. 48.

" room

" room in anger, and when he got into the
" ſtreet was heard to ſay—' Damnation ſeize
" me if I do not fetch ſomething and ſtick
" him.' — And being reproved for uſing
" ſuch expreſſions, he anſwered,—' I'll be
" damned to all eternity if I do not fetch
" ſomething and run him through the
" body.'—The deceaſed and the reſt of the
" company continued in the room where
" the affray happened: and in about half an
" hour the priſoner returned, having put off
" a ſlight thin coat he had on when he quit-
" ted the room, and put on one of a coarſe
" thick cloth. The door of the room being
" open into the ſtreet, the priſoner ſtood
" leaning againſt the door-poſt, his left
" hand in his boſom, and a cudgel in his
" right, looking in upon the company, but
" not ſpeaking a word. The deceaſed ſee-
" ing him in that poſture invited him into
" the company; but the priſoner anſwered,
" —' I will not come in.'—' Why will you
" not?'—ſaid the deceaſed. The priſoner
" replied,—' perhaps you will fall on me
" and beat me.'—The deceaſed aſſured him
" that he would not; and added—' beſides,
" you think yourſelf as good a man as me

" at

" at cudgels, perhaps you will play at cud-
" gels with me.'—The priſoner anſwered,
" —' I am not afraid to do ſo, if you will
" keep off your fiſts.'—Upon theſe words
" the deceaſed got up and went towards the
" priſoner, who dropped the cudgel as the
" deceaſed was coming up. The deceaſed
" took up the cudgel, and with it gave the
" priſoner two blows on the ſhoulder. The
" priſoner immediately put his right hand
" into his boſom, and drew out the blade
" of a tuck-ſword, crying,—' Damn you
" ſtand off, or I'll ſtab you;'—and imme-
" diately, without giving the deceaſed time
" to ſtep back, made a paſs at him with the
" ſword, but miſſed him. The deceaſed
" thereupon gave back a little, and the pri-
" ſoner ſhortening the ſword in his hand,
" leaped forward toward the deceaſed, and
" ſtabbed him to the heart, and he died in-
" ſtantly."—In Michaelmas term following the judges delivered their opinion; and they unanimouſly agreed that the priſoner was guilty of murder. After reporting the caſe, Sir Michael Foſter obſerves, that—" all
" circumſtances conſidered, he appeareth
" to have returned with a deliberate reſolu-

" tion to take a deadly revenge for what had " paſſed; and the blows were plainly a pro- " vocation *ſought* on his part, that he might " execute the wicked purpoſe of his heart " with ſome colour of excuſe[w]."

3. However ſhort or long the time that intervenes after the intent is formed and before it is executed, if the offender have an opportunity to recollect the nature of the offence, it is held to be deliberate[x]. ——If one man wilfully kill another, without any apparent motive or provocation, however ſuddenly, he cannot but be aware of the nature of the offence; his intent is deliberate, the offence is committed from malice, and it is murder[y]. —— If a man, in a ſtate of provocation, wilfully kill any perſon, and, according to the common courſe of things, there be ſufficient time for his paſſion to ſubſide, after the provocation and before he commits the offence, it admits of no excuſe, whatever be the cauſe of the provocation, or whatever the degree of paſſion it may excite: the act itſelf ſhews

[w] Foſt. 132.
[x] 2 Keb. 19.
[y] 3 Inſt. 5. 1 Hale, 455. Kel. 50. Foſt. 313.

a de-

a determination to be revenged; his intent is deliberate; and in this caſe alſo the offence is committed from malice, and it is murder[z].

4. When a man intends to do any unlawful act which is *malum in ſe*, and there is any probability that it will occaſion death or a perſonal injury to any one, and in carrying this intent into execution he kills any perſon, the law implies that he intended to kill him; it is felonious; and however ſudden or accidental the death, it is attributed to the original intent[a]; and as that is always deliberate, the intent to kill or to hurt is alſo held to be deliberate; the offence is therefore committed from malice, and it is murder. —— If, for inſtance, A go out to rob, without any actual intention to kill or to occaſion a perſonal injury, and in his attempt to rob any perſon, ſuddenly or accidentally kill him, he is guilty of murder[b]. —— But if the act originally intended do not imply an intent to kill or to hurt, the offence is not attributed to the

[z] 1 Hale, 486. Foſt. 296. [b] 1 Hale, 465.
[a] Ante, p. 20.

original intent, but is ſubject to the ſame conſtruction as if it had never exiſted.

5. If a man go out to commit a felony or any unlawful act, which is *malum in ſe*, and which is not of itſelf likely to lead him to kill or to hurt any perſon, and he go out armed, for the purpoſe of reſiſting by force any perſon who may oppoſe him, or if there be any other circumſtances to ſhew ſuch a reſolution, and in making the attempt he kill any perſon, there is an actual intent to kill or to hurt at the time the deſign is formed; and however ſudden or accidental the offence, it is attributed to the original deſign; and as this deſign is always felonious and deliberate, all the circumſtances neceſſary to conſtitute malice are completed, and the offender is guilty of murder [c]. But if the act intended be lawful, or if it be unlawful and *malum prohibitum* only, and he go out armed for the purpoſe of reſiſting by force any perſon who may oppoſe him, and he kill any perſon, it cannot be attributed to the original deſign, becauſe his intent at that time is not felonious; but

[c] Crom. 22. ſ. 13. 1 Hale, 444. 1 Haw. 196.

the

the offence is ſubject to the ſame conſtruction, as if the original deſign had never exiſted.

6. When one man has formed a deſign to kill another, accidental circumſtances may occur as to the time, the place, or the manner in which he carries his deſign into execution: but the original deſign, the intent to kill or to hurt, is the material point to be examined; and if it be deliberate, no ſubſequent circumſtances, however accidental, can prevent the offence from being murder. If a man intend to lie in wait at a particular place to kill any perſon, and in going to that place he unexpectedly meet his perſon, and inſtantly kill him, the offence is the ſame as if he had killed him at the place he at firſt intended. —— If A from malice make an attack upon B, and he reſiſt, and A gain the advantage, and kill B, B is juſtified in reſiſting; it cannot be inferred that A intended to defend himſelf, or that it is a ſudden offence in conſequence of his being provoked by the reſiſtance; but it is attributed to the attack; and as the attack is made from malice, the offence itſelf

ſelf is held to be committed from malice, and it is murder, in the ſame manner as if there had been no interchange of blows[d].

—— If A from malice be cocking a piſtol or drawing his ſword to kill B, B is juſtified in reſiſting even before the attack is made, and if in the conteſt A gain the advantage and kill B, the offence is the ſame as if no reſiſtance had been made.

7. If A from malice make an attack upon B, and he reſiſt and overpower him, and then A wholly relinquiſh his deſign, and retreat as far as he can, and afterwards kill B to ſave his own life, yet if B do not carry his reſiſtance beyond what he may reaſonably conſider as neceſſary for his own defence, A is guilty of murder. All the blame attaches to A; the offence is occaſioned by the malice; and it is ſubject to the ſame conſtruction as if this ſudden intent to ſave his own life had never been formed. If A having diſcharged a piſtol at B run away, and B purſuing him, A turn again, and then kill B to ſave his own life;—or if A intending to kill B make an attack upon

[d] Kel. 61, 128. Foſt. 295.

him

him, and he turn again ſo furiouſly that A cannot retreat, and he then kill B to ſave his own life;—or if A fall to the ground and then kill B to ſave his own life;—B does not carry his reſiſtance beyond what he may reaſonably conſider as neceſſary for his defence; and if the firſt attack be made from malice, no circumſtances, however favourable, can prevent A from being guilty of murder[e]. —— But if A make an attack from malice upon B, and whilſt he is in the act of carrying this deſign into execution he relinquiſhes it and retreats, under circumſtances which ſhew that B cannot then have cauſe to ſuppoſe himſelf in danger, and B follow him to kill him, and then A to ſave his own life kill B, it may be manſlaughter or homicide *ſe defendendo;* but I do not think that it can be murder. If the death were occaſioned by the firſt attack made by A, he would be guilty of murder: but A after the attack wholly relinquiſhes the deſign; he retreats; he ſhews that he has no intention to kill B, and yet B purſues him to kill him: B is then acting criminally; A is

[e] 1 Hale, 479, 480, 481, 482. Kel. 129.

juſtified

juſtified in reſiſting; and the death, as I conceive, is therefore to be attributed to this criminality, and not to the firſt attack made by A.

8. When one man who actually intends to murder another wholly relinquiſhes his deſign, and afterwards ſuddenly kills this perſon in conſequence of ſomething which has no connection with his former intent to murder him, it is ſubject to the ſame conſtruction as if this former intent had never exiſted. If two men have malice againſt each other, and a ſincere reconciliation take place, and they afterwards meet by accident, and quarrel, and immediately fight,—or if there be a law-ſuit between two men, and they ſuddenly quarrel and fight,—neither the malice nor the law-ſuit can be coupled with the act of fighting, and if one of them kill the other, the offence is ſudden, not deliberate, and it is manſlaughter: one of the circumſtances neceſſary to conſtitute malice is wanting, and it therefore cannot amount to murder [f].

[f] 1 Hale, 451, 453. 1 Haw. 191.

9. When

Offences committed from a vindictive diſpoſition are held to be deliberate.

9. When a man in a ſtate of provocation ſuddenly kills any perſon, and the circumſtances under which he does it ſhew that it reſults from a vindictive diſpoſition, the conſtruction of what is deliberate deviates from the common meaning of that word: the vindictive diſpoſition is deliberate, and as the offence is occaſioned by this diſpoſition, the intent with which it is committed is alſo held to be deliberate[a].

[a] 1 Hale, 455. 1 Haw. 189. Foſt. 256, 262, 291.

It appears to be one of the principal objects of the very valuable diſcourſe upon homicide by Sir Michael Foſter, to ſhew that the offences which admit of this conſtruction are committed from malice; and that they are murder: and in almoſt every inſtance he varies the language by which he deſcribes it. He ſays that the fact muſt be attended,—"with ſuch circumſtances "as are the ordinary ſymptoms of a wicked, depraved, malignant ſpirit:—with ſuch circumſtances as carry in them "the plain indication of an "heart regardleſs of ſocial "duty, and fatally bent on "miſchief."—He ſometimes calls it—"the miſchievous vindictive diſpoſition:"—"the heart "bent on miſchief:"—"the wicked vindictive "diſpoſition:"—"the *mala* "*mens*:"—"the malignity of heart"—But I have uſed but one mode of deſcribing it, and that is intended to mean all that is meant by the terms thus uſed by Sir Michael Foſter. It is to be obſerved, that there is a difference between an *act* which may be called vindictive, and ſuch an act as ſhews a vindictive *diſpoſition*.

Whether

Whether an offence be committed from a vindictive diſpoſition or not, is determined by the manner in which it is committed: and every inſtance which admits of this conſtruction, will, I believe, be found in one of the two following ſections. The offences mentioned in theſe ſections are committed with deadly weapons: but it is to be obſerved, that whatever be the manner in which the offence is perpetrated, if it be likely to occaſion death, it equally ſhews a vindictive diſpoſition.

The diſtinction between murder and manſlaughter, in ſome of the caſes which admit this conſtruction, is but ſlight, and yet I think it is ſufficiently evident. If the offender be in a ſtate of provocation, and under the firſt impulſe of his paſſion kill any perſon, and the manner in which he does it ſhews that it reſults from a vindictive diſpoſition, it is murder: but if there be no circumſtances from which it can be implied that it reſults from a diſpoſition of this kind, the offence cannot be deliberate, and it is manſlaughter only.

10. If

10. If one man be provoked by another, in conſequence of any thing for which there is no right to lay hands upon him, and under the firſt impulſe of this provocation he ſtrike him with a deadly weapon, and it occaſion his death, the ſtriking him with ſuch a weapon for ſuch a provocation, is, as I conceive, in all caſes, except when the parties quarrel and fight fairly[c], held to ſhew a vindictive diſpoſition; and however ſudden the offence, as this diſpoſition is deliberate, the intent with which the offence is committed is alſo held to be deliberate, and the offender is guilty of murder. But if the offence be committed with any thing not likely to occaſion death, or if the parties quarrel and fight fairly, the provocation is ſome degree of excuſe, and the offender is guilty of manſlaughter only; it is not ſufficient to ſhew a vindictive diſpoſition: a ſudden act committed in conſequence of this provocation cannot be conſidered as deliberate, and therefore cannot be murder. If a man uſe any actions expreſſive of reproach or contempt,—if he demand a debt, or come

Killing in conſequence of a provocation ariſing from any thing for which there is no right to layhands upon a man.

[c] Chapter on duelling and fighting, ſect. 4.

to

to ſerve a writ,—if he whip the horſe upon which any perſon is riding,—if one man meet another, and without touching him take the wall of him,—or if a perſon break his word or promiſe,—and in conſequence of any of theſe acts any man be provoked, and he immediately with a deadly weapon ſtrike the perſon provoking him, and it occaſion his death; there can be no right for one man to lay hands upon another for any of theſe cauſes; the provocation may be extremely aggravating, but the killing of a man under ſuch circumſtances as theſe admits of no excuſe; there is an actual intent to kill or to hurt the perſon of another, it is evidently felonious; it is deliberate becauſe it is committed from a vindictive diſpoſition; all the requiſites neceſſary to conſtitute malice are completed, and the offender is therefore guilty of murder[d].

Brain's caſe. A perſon going by a butcher's ſhop, ſmiled and made a wry mouth at him; the butcher immediately went out, and, his back being towards him, the butcher ſtruck him

[d] 1 Hale, 455. 1 Haw. 192, 194. Foſt. 290, 291.

upon

upon the calf of his leg, and he died inſtantly. In one report of the caſe it is ſaid that he ſtruck him with a ſhort ſword; but in the other, what the blow was given with is not mentioned. They had quarrelled, and fought two days before. The butcher was tried in the King's Bench, 42 Eliz. and it was unanimouſly held by the court that he was guilty of murder[e].

A woodward found a boy in his maſter's park upon a tree cutting wood; he deſired the boy to come down, and immediately after he was down the woodward gave him two blows with his ſtick, and tied him to his horſe's tail: the horſe ran away, dragged him along the ground, and it killed him. The woodward was tried at Newgate, 4 Car. and a ſpecial verdict was found; and upon its being referred to the judges it was held by all of them except one, that he was guilty of murder[f]. If the boy had perſiſted in cutting the wood, the woodward might have beaten him to have prevented it; but he had no right to beat him afterwards[g]. Halloway's caſe.

[e] Cro. Eliz. 778. Noy, 171. W. Jon. 198.
[f] Cro. Car. 131. [g] Kel. 132.

If

Killing in conſequence of provoking words.

If one man be provoked by another, in conſequence of any thing which he may ſay, and he immediately ſtrike him with a deadly weapon, and it kill him, however provoking the words, it in all caſes, except when they quarrel and fight fairly, is held to ſhew a vindictive diſpoſition, and the offence is murder. There can be no right for one man to lay hands upon another for any provocation of this kind, and therefore the offence falls within the above rule [h].

Two perſons were playing at tables, and they quarrelled about the game, and one of them ſuddenly took his dagger, and killed the other. He was tried at the aſſizes at Cheſter, and it was held to be murder. About 27 Eliz [i].

A man was ſitting drinking in a public-houſe, and a woman called him a ſon of a whore; he took up a broomſtick, and at a diſtance threw it at her; it ſtruck her upon the head, and occaſioned her death. He was tried at Newgate, a ſpecial verdict was

[h] 1 Hale, 456. 1 Haw. 192. 200. Kel. 55. Foſt. 290, 291. 4 Black.
[i] Cromp. 23. l. 27.

found

found, and it was referred to the judges. 26 Car. 2: but they were not unanimous whether the broomſtick were to be conſidered as a deadly weapon or not, and he was therefore pardoned[k].

A man had been convicted of a libel, and a part of the ſentence was that he ſhould be whipped from Newgate to Tyburn. As he was returning from Tyburn in a coach, after he had had the whipping, a perſon aſked him whether he had run his heat that day? He made a ſcurrilous reply; the perſon immediately ſtruck him in the eye with a ſmall ſword which he had in his hand, and it occaſioned his death in two days after. He was tried at the Old Bailey. 1 Jac. 2. and was found guilty of murder[l]. Robert Francis' caſe.

Two men were beating one man in the ſtreet, in the night, and a ſtranger paſſing by, ſaid, "I am aſhamed to ſee two men "beating one," and immediately one of the men who were beating him ran to the ſtranger in a furious manner, and with a knife

[k] 1 Hale, 456. [l] 3 Mod. 68.

gave

gave him a deep wound, of which he died ſoon after. He was tried at the Old Bailey, 9 Geo. Some of the judges of the Common Pleas were preſent; and it was held that he was guilty of murder[m].

Killing in conſequence of a provocation ariſing from any thing for which there is a right to lay hands upon a man.

11. If one man be provoked by another, in conſequence of any thing for which there is a right to lay hands upon him, or to beat him, but for which there is no right to kill him, and whilſt he is under the firſt impulſe of this provocation he ſtrike him with a deadly weapon, and it occaſion his death, the ſtriking a man with ſuch a weapon for ſuch a provocation, is, as I conceive, in all caſes, except one, held to ſhew a vindictive diſpoſition; and, as the diſpoſition is deliberate, however ſudden the offence, the intent with which it is committed is alſo held to be deliberate, and the offender is guilty of murder. But if the offence be committed with any thing not likely to occaſion death, in this, as in the laſt ſection, the provocation is ſome degree of excuſe, and the offender is guilty of man-

[m] 8 Mod. 164.

ſlaughter

ſlaughter only: it is not ſufficient to ſhew a vindictive diſpoſition; a ſudden offence committed in conſequence of this provocation cannot be conſidered as deliberate, and it therefore cannot be murder. —— When one man finds another in the act of adultery with his wife, he may beat him to prevent it, but he cannot be juſtified in killing him; and if, in the firſt tranſport of his paſſion, he ſtrike the adulterer with a deadly weapon and kill him, it conſtitutes the exception to the above rule: an offence committed in conſequence of a provocation of this kind is in part excuſed, the law does not imply a vindictive diſpoſition; and as the offence is ſudden, it is manſlaughter, and not murder[n]. —— But if a man find a treſpaſſer upon his land, and in the firſt tranſport of his paſſion he take up a bill or hedge-ſtake and knock out his brains, it falls within the above rule, it ſhews a vindictive diſpoſition, and is murder[o]. —— A man may correct his wife, a parent his child, a ſchoolmaſter his ſcholar, a maſter his apprentice or ſervant; but if he be pro-

[n] 1 Hale, 486. Foſt. 296. [o] Foſt. 291.

voked, and, inſtead of uſing reaſonable correction, he take up a deadly weapon, and it occaſions death, in this caſe alſo it ſhews a vindictive diſpoſition, and it is murder[p]: it is impoſſible to ſuppoſe, that in taking up a deadly weapon he means to do what is legal; the offence is committed from a felonious intent to kill or to hurt; and it is deliberate becauſe it is occaſioned by a vindictive diſpoſition. —— If a maſter in giving his ſervant moderate correction, by accident kill him, it is homicide *per infortunium*; — if he beat the ſervant in an unreaſonable manner, but not with a deadly weapon, or in ſuch a way as is likely to occaſion death, it is manſlaughter; — if he beat him with a deadly weapon, or in any manner likely to occaſion death, then it is murder: — and all the caſes which fall within this ſection are equally ſubject to this conſtruction. —— When one man is juſtified in killing another, he is juſtified in uſing a deadly weapon; and if he be in a ſtate of provocation for any thing for which he has this right, and he ſuddenly and feloniouſly kill

[p] 1 Hale, 454. 1 Haw. 176. Foſt. 262.

any

any perſon, the act of uſing a deadly weapon is then leſs criminal than in other caſes; it is not ſufficient to ſhew that the offence was committed from a vindictive diſpoſition; it cannot be conſidered as deliberate; and in ſuch caſes the offender is guilty of man-ſlaughter only.

A man and his wife quarrelled, he ſtruck her with a peſtle, and ſhe died inſtantly. He was tried at the aſſizes, at Stafford, about 43 Eliz. and it was held to be murder[q].

A ſmith reprimanded his ſervant, and upon his receiving a croſs anſwer he thruſt a red-hot iron, which he then had in his hand, into his ſervant's belly. It killed him, and it was held to be murder. Cited in Grey's caſe. inf.

A woman was indicted for the murder of her child; it appeared that ſhe kicked it, and ſtamped upon its belly; and it was held to be murder. Cited in Grey's caſe. inf.

[q] Cromp. 120. a.

Grey's caſe.

A blackſmith deſired his apprentice to do ſomething which was a part of his buſineſs, and the apprentice neglected it. The maſter aſked him why he had not done it, and told him, that if he would not ſerve him he ſhould ſerve in Bridewell; and the apprentice replied, that he had as good ſerve in Bridewell as ſerve him. Upon this the maſter, without any other provocation, ſtruck the apprentice with a bar of iron which he then had in his hand; it fractured his ſkull and occaſioned his death. He was tried at the Old Bailey, Oct. 1666; a ſpecial verdict was found, and the judges were all of opinion that it was murder[r].

A maſter ſtruck his apprentice with a great ſtaff; it occaſioned his death; and it was held to be murder. Norwich aſſizes, 1670[s].

Keate's caſe.

A gentleman intending to diſcharge his gardener ſent for the key of the garden, and the gardener refuſed to ſend it. He then went to look for his ſword, and having

[r] Kel. 64. [s] 1 Hale, 474.

found

found it, carried it with him into the kitchen; he expoſtulated with the gardener, and the gardener ſaid he might have the key if he would. The gentleman then drew his ſword, and ſtruck the gardener with it upon the head; the gardener took the handle of a ſcythe, and in attempting to ſtrike his maſter was hindered by a rack, but he punched him with it ſeveral times. The maſter then retired towards the door, and gave the gardener a wound which killed him. He was tried at the aſſizes; a ſpecial verdict was found; and it was argued in the King's Bench, 8 and 9 W. 3. Lord Chief Juſtice Holt ſaid that the maſter was guilty of murder: but the other judges did not give their opinion; and as the indictment was found to be defective there was no deciſion upon the caſe itſelf[t].

[t] L. Raym. 138.

MANSLAUGHTER.

EVERY inſtance in which it is poſſible for one man to kill another, which is felonious, and which does not amount to murder, is manſlaughter*: the ſentence of the law is death, but the offender is entitled to the benefit of clergy.

Whether the offence be murder, depends upon the exiſtence or non-exiſtence of the three circumſtances which are neceſſary to conſtitute malice: — and if one man feloniouſly kill another, and there be neither an actual intent to kill or to hurt the perſon of another, nor any thing which can imply ſuch an intent; — if one man feloniouſly kill

* The circumſtances which conſtitute the offence of manſlaughter are in different caſes of a very different deſcription: and it therefore does not admit of a conciſe and general definition.

another

another without having a felonious intent[b]; — or if one man kill another, and his intent be ſudden, not deliberate; — the offence is manſlaughter, and not murder: and I believe that every inſtance of manſlaughter which can be ſuggeſted will fall within one of theſe diviſions.

The word felonious is uſed for the ſame purpoſe here as it is when applied to murder; to diſtinguiſh thoſe caſes which are criminal from thoſe which are not: but in murder it is applied to the intent, here it is applied to the offence itſelf; and I think it may be ſtated as a rule which applies to every caſe of manſlaughter, that whenever the act of putting a man to death is unjuſt, that then it is alſo felonious.

. Of killing a man feloniouſly, when it cannot be murder in conſequence of there being no intent to kill or to hurt.

1. When a man in doing any act which is unlawful and *malum in ſe*, by accident

Doing an unlawful act not likely to kill or to hurt.

[b] This applies only to perſons who are not engaged in the public ſervice; for the killing of a man engaged

dent kill any perſon, and there is no probability that it will occaſion death or a perſonal injury to any one, it is manſlaughter. The doing of an unlawful act is unjuſt, the homicide is occaſioned by this act, and therefore the homicide itſelf is held to be felonious: and although the offender uſe every poſſible degree of caution to prevent the accident, it ſtill amounts to the ſame offence. But there is neither an actual nor implied intent to kill or to hurt, and it therefore cannot be murder[a].

Doing a lawful act not likely to kill or to hurt, but doing it in an improper manner.

2. If a man be doing a lawful act, or doing any act that is unlawful and *malum prohibitum*, but not *malum in ſe*, and it be not likely to kill or to hurt the perſon of any one, and for want of uſing reaſonable caution he kill any perſon, the want of caution makes it felonious, and it is manſlaughter: but if as much caution be uſed as under ſimilar circumſtances is uſed by men in general, there is then no crimina-

gaged in the public ſervice is ſubject to a different conſtruction, and it may be murder, although there be nothing criminal in the intention of the offender.

[a] 1 Hale, 39, 475. 1 Haw. 177. Foſt. 258, 259, 261. p. 10, 11, 12.

lity,

lity, and it is homicide *per infortunium*. — If for inſtance a man who is not qualified ſhoot at game, it is an unlawful act, but it is *malum prohibitum* only: if in ſhooting without reaſonable caution he by accident kill any perſon, it is manſlaughter; but if he uſe reaſonable caution it then cannot be more than homicide *per infortunium*. In caſes of this kind it is ſcarcely poſſible, that there can be any probability that the act intended will occaſion death, or a perſonal injury to any one; but whether there be this probability or not, the offence is not committed in conſequence of an *intent* to kill or to hurt, and it therefore cannot amount to murder. —— The ſufficiency or inſufficiency of the caution is the principal point to be aſcertained: if a workman throw any thing down from a building without giving warning, — if a man who is driving a cart, and might have ſeen the danger, drive on without ſeeing it, — if a man riding in a ſtreet put his horſe into ſpeed and run over a child, — if one man whip the horſe upon which another is riding, and it throw the rider, — if a man have a bull, or any other animal that is dangerous, and he keep

keep it in a place, or in a manner which cannot be ſecure, — if one man give another purging comfits to make ſport, — and in conſequence of theſe acts any perſon is killed by accident, the caution uſed is not ſufficient, and the offender is guilty of manſlaughter[b].

When workmen are employed in any of the public ſtreets in London where people are paſſing, an unuſual degree of caution is required: if they merely call to the people paſſing, and then throw any thing down, and it by accident kill any perſon, ſufficient caution is not uſed, and it is manſlaughter; — "for in the noiſe and hurry of a public "ſtreet few people hear the warning, or "ſufficiently attend to it." — But if the workmen be employed in any private ſtreet, or in any place where the warning can be heard and attended to, calling out to the perſons below is then ſufficient[c].

Burton's caſe. A man came to town in a chaiſe; before he got out he fired his piſtols, and by ac-

[b] 1 Hale, 431, 472, 475, 476. 1 Haw. 176, 177. Foſt. 259, 262, 263.
[c] Foſt. 263.

cident

cident killed a woman. He was tried before King, C. J. 8 Geo. and it was held to be manſlaughter[d].

A man who was throwing at a cock at Shrovetide, as a diverſion, miſſed his aim; the ſtaff ſtruck a child who was looking on, and killed it: he was tried on the circuit before Sir Michael Foſter, and it was held to be manſlaughter[e].

A hackney coachman found a ſoldier's horſe piſtol in the ſtreet, and he carried it home and ſhewed it to his maſter. They put the rammer into the piſtol, and they thought it was not charged: but the coachman pulled up the cock, and it went off and killed his wife, who was ſtanding by. He was tried at the Old Bailey 1664, and found guilty of manſlaughter. It is however to be obſerved, that the authority of this caſe has been doubted by two very diſtinguiſhed men, Lord Chief Juſtice Holt, and Sir Michael Foſter; and that as the caution uſed by the coachman was, at leaſt, Rampton's caſe.

[d] 1 Str. 481. [e] Foſt. 263.

equal

equal to what would have been uſed by men in general, I do not conceive how this caſe can invalidate the general rule[f].

II. *Of killing a man felonioufly, when it cannot be murder, in conſequence of the intent not being felonious.*

When a man is guilty of murder, his criminality is wholly determined by his intent: but in the caſes compriſed in this diviſion, the guilt of the offender is determined by the criminality of the act itſelf, and not by the intent. In theſe caſes the intention of the offender is wholly blameleſs, but the act he commits is criminal; the offence is therefore held to be felonious, and it is manſlaughter: there is an actual intent to kill or to hurt the perſon of another; but as this *intent* is not felonious, the offender cannot be guilty of murder.

Playing at foils, &c.

1. If two perſons be playing at foils, or at cudgels, if they box or wreſtle, or do

[f] Kel. 41. Foſt. 263, 264.

any

any other act for their *recreation*, in a manner more likely to be dangerous than is uſual, and one of them by accident kill the other, the taking of recreation in this manner makes it felonious, and the offence is manſlaughter. But if they play at foils, or cudgels, or box or wreſtle, for their recreation, and they uſe as much caution as is generally uſed upon ſuch occaſions, there is then no criminality, and it is homicide *per infortunium*[a].

Sir John Chicheſter and his ſervant were playing as if at foils; he had a ſword in its ſcabbard, and the ſervant a bed-ſtaff. Sir John bade his ſervant guard, and he made a thruſt, and in parrying it the ſervant broke off the chape of the ſcabbard; but as the thruſt was not effectually parryed, the point of the ſword entered the ſervant's groin and killed him. Sir John was tried at bar in the Court of King's Bench, 23 Car. 1. and it was held to be manſlaughter. It was uſual with them to amuſe themſelves in this manner; but the act of uſing ſuch weapons

Sir John Chicheſter's caſe.

[a] 1 Haw. 177. Foſt. 259, 260.

ſhews

ſhews a want of "that degree of circum-
"ſpection which common prudence would
"have ſuggeſted; and therefore the fact ſo
"circumſtanced might well amount to man-
"ſlaughter[f]."

Killing in uſing correction.

2. A huſband has a right to correct his wife, a parent his child, a ſchoolmaſter his ſcholar, a maſter his apprentice or ſervant: and if a man, in exerciſing this right in an improper manner, but not in ſuch a manner as is likely to occaſion death, unintentionally kill any perſon, it is manſlaughter: it is a legal act executed in an improper manner, and it is therefore felonious; but the intent is not felonious, and it therefore cannot be murder[a]. —— When a man commits an offence of this kind it generally happens that he is provoked, and commits the offence in conſequence of the provocation, and it is then ſubject to a different conſtruction[b]. —— If the offence be committed with a deadly weapon, or with any thing likely to occaſion death, nothing can prevent it from being murder[c].

[f] 1 Hale, 472. Foſt. 260.
[a] 1 Hale, 454. 1 Haw. 176. Foſt. 262.
[b] Poſt, p. 74. ſ. 2.
[c] Ante, p. 48. ſ. 11.

One

3. One man may kill another to ſave his own life, if there be reaſonable cauſe to ſuppoſe that his life cannot be ſaved without it: but if there be reaſonable cauſe to ſuppoſe that his life would have been ſaved without it, he then ought not to have killed him; the offence is therefore felonious, and it is manſlaughter. If A make an attack upon B to kill him, and B have an opportunity of retreating, but inſtead of retreating he immediately reſiſt, and kill A, he is guilty of manſlaughter, although he did it to ſave his own life: when he has this opportunity he cannot foretell what change the act of retreating may occaſion; without retreating it is impoſſible for him to have reaſonable cauſe to ſuppoſe that his life is in danger, and therefore the act of killing A is felonious. But when a man has retreated as far as he can, or if the attack be made in ſuch a place, or in ſuch a manner that he cannot retreat without putting his life in danger, it is then homicide *ſe defendendo*[a].

Abuſing the right of ſelf-defence.

—— When A makes an attack upon B, and B immediately kills him, he may have

[a] 1 Hale, 453, 481, 482. 277, 278.
1 Haw. 178. Foſt. 273,

been

been provoked by the attack, and may have killed A in conſequence of the provocation, without thinking of the right of ſelf-defence: it may ſometimes be difficult, if not impoſſible, to aſcertain whether the offence be committed in conſequence of the provocation, or in conſequence of the abuſe of the right of ſelf-defence; but under either conſtruction the offence is manſlaughter, and therefore it is not material[a].

B ran after A and beat him with a ſtick; A turned again and beat B and he died. A might have run away from him if he would, and it was held that he was a felon. 43 Ed. 3[b].

A and B were walking together in Fleet-Street. B uſed ſome provoking language, and A immediately gave him a box on the ear; they cloſed; B was thrown down, and it broke his arm. B then ran into his brother's houſe, which was near, and the brother taking the alarm immediately, went out, with his ſword drawn, and made to-

[a] Poſt, p. 76. ſ. 3. [b] 43 Aſſ. 31.

wards

wards A. Upon this A retreated ten or twelve yards, the brother kept purſuing him, and A drew his ſword and killed him; but he might have retreated out of danger. He was tried at Newgate in 1671, and was found guilty of manſlaughter[c].

A man ordered his ſon, who had come home drunk, to go to bed, but as he refuſed a ſcuffle enſued between them. Another ſon, who was then in bed, hearing the diſturbance, got up, fell upon his brother, threw him down upon the ground and beat him, and kept him down, ſo that he could neither eſcape nor avoid the blows. As they were ſtruggling, the ſon who came home drunk gave his brother a wound with a pen-knife, and it occaſioned his death. He was tried at the Old Bailey in 1704; a ſpecial verdict was found; and upon the reference to the judges, it was unanimouſly held that he was guilty of manſlaughter: — "for there did not appear to be any inevi- "table neceſſity ſo as to excuſe the killing "in this manner[d]." Nailor's caſe.

[c] 1 Hale, 488. [d] Foſt. 278.

Abuſing the right of defence againſt felons.

4. One perſon may be juſtified in killing another to prevent his committing a robbery, a rape, an unnatural crime, or any other felony likely to endanger the perſon: but there muſt be reaſonable cauſe to ſuppoſe that he intended to commit a felony of this kind; and there muſt alſo be reaſonable cauſe to ſuppoſe that the felony cannot be prevented without killing him. But a man is not bound to give back to a felon: and he therefore may be juſtified in killing a felon although he do not retreat. —— If one man attempt to pick another's pocket, or to commit any other felony; or if one man attempt to commit an offence which does not amount to felony; and the perſon upon whom the attempt is made kill him without having a reaſonable cauſe to ſuppoſe that he intends to commit a felony likely to endanger his perſon, it is manſlaughter: he ought then rather to ſubmit to the offence, than to kill the perſon making the attempt, and therefore the act of killing him is felonious. Or if there even be reaſonable cauſe to ſuppoſe that a man actually intends to commit a robbery, a rape, or an unnatural crime, yet, if the

perſon upon whom the attempt is made have reaſonable cauſe to ſuppoſe that it may be prevented without killing the felon, he then ought not to kill him, and if he do he is guilty of manſlaughter[b].

5. When a man makes an attack upon a houſe, the owner or any other perſon is juſtified in killing him; if there be reaſonable cauſe to ſuppoſe that he intends to commit a felony, and if there be reaſonable cauſe to ſuppoſe that the felony cannot be prevented without it; and he may kill the felon without retreating. If he evidently intend to commit a treſpaſs, or if the attack be made under circumſtances which ſhew that there is no intent to commit a felony, a man ought rather to permit the offence than to kill the perſon making the attack, and if he do kill him it is manſlaughter. —— Or if there be an actual intent to commit a felony, and there be reaſonable cauſe to ſuppoſe that this felony may be prevented without killing him, in this caſe alſo he ought not to kill him, and if he do, he is

Abuſing the right to defend a houſe.

[b] 1 Hale, 485, 486, 487. 274, 278. 4 Black. 180. 1 Haw. 172, Foſt. 273.

guilty of manſlaughter[b]. —— When a man comes into a houſe to commit a treſpaſs, and his intentions are known, and he attacks the owner, and the owner has an opportunity to retreat, but inſtead of retreating immediately kills him, it is manſlaughter; he cannot be juſtified in killing him in defence of his houſe, becauſe the offence intended is not a felony: if the owner kill him in his own defence, it cannot be juſtifiable, becauſe he ought to have retreated. It however is ſaid that he need not retreat, for that by retreating he would give up the poſſeſſion of his houſe[c]: but the right of the owner to kill any perſon without retreating is confined to thoſe caſes only where there is reaſonable cauſe to ſuppoſe that a felony is intended to be committed; and as in this caſe a treſpaſs only is known to have been intended, the owner is, as I conceive, bound to retreat, rather than kill him without retreating[d].

Harcourt's caſe

A man who pretended that he was entitled to a houſe, went to get it into his poſ-

[b] 1 Hale, 445, 474, 485, 486, 487. 1 Haw. 172, 192. Foſt. 274.

[c] 1 Hale, 486.

[d] 1 Hale, 481.

ſeſſion,

ſeſſion, and ſhot an arrow at Harcourt, who was then in the houſe, and had been in poſſeſſion of it ſeveral years. He had a ſtranger with him, and Harcourt ſhot an arrow out of the houſe and killed this man. He was tried, 5 Eliz. and by the advice of all the judges it was held to be manſlaughter[e].

Thirty perſons, in September, 30 Eliz. forcibly entered the manor-houſe of Drayton Baſſet, and turned out the family and ſervants. Three days after, twenty perſons, on the part of the owner, went about ten o'clock at night to get poſſeſſion of the houſe, and one of the thirty fired a gun out of the houſe, and killed one of the twenty. He was tried in the King's Bench, and found guilty of manſlaughter. It was ſaid that one of the twenty threw ſome fire upon the thatch of a building which adjoined the houſe: but whether this were true or not, as it was known that they came only to get poſſeſſion of the houſe for the owner, the perſons in the houſe could not have been juſtified in firing the gun[f].

[e] Cromp. 29. ſ. 15. [f] Cromp. 28. ſ. 14.

Mr.

Ford's caſe.

Mr. Ford and ſeveral perſons were in company in a room in a tavern. Several others came and would have the room, and turn them out. Mr. Ford ſaid, if they had civilly deſired it they might have had it, but he would not be turned out by force. Upon this they drew their ſwords, and Mr. Ford drew his, and killed one of them. He was tried in the King's Bench, and it was held to be juſtifiable. The party who thus came into the room meant to commit a treſpaſs only, and therefore if Mr. Ford had killed this man in defence of the room it could not have been juſtifiable: but it is probable that he killed him in his own defence, and then it might be juſtifiable; and though it is not ſtated, yet this I think muſt have been the ground upon which the deciſion was founded[s].

III. *Of killing a man felonioufly when it cannot be murder, in conſequence of the intent being ſudden.*

Whether an offence be ſudden or deliberate is not decided by the length of time

[s] Kel. 51.

which

which paſſes in planning and carrying it into execution. If one man actually intend to kill another, and he be free from paſſion, however ſhort the time before the offence is committed, it is conſidered as a deliberate act of the mind. — If a man be in a ſtate of provocation, and there be ſufficient time before he commits the offence for his paſſion to ſubſide, it is ſubject to the ſame conſtruction as if the paſſion had not exiſted: — or if a man be in a ſtate of provocation, and he kill any perſon in the firſt impulſe of his paſſion, and the manner in which he puts him to death ſhews a vindictive diſpoſition, however ſudden the offence, in this caſe alſo it is held to be deliberate; and in all caſes which fall within any of theſe rules the offender is guilty of murder. — But if a man be in a ſtate of provocation, and he feloniouſly kill any perſon in the firſt impulſe of his paſſion, and it do not ſhew a vindictive diſpoſition, the offence is ſudden, not deliberate, and it is manſlaughter.

The principal object is to diſtinguiſh when the offence is committed from a vindictive diſpoſition and when it is not: and

every

every caſe of manſlaughter in which the offence is ſudden, and not committed from a vindictive diſpoſition, will fall within one of the following ſections.

Provocation ariſing from any thing for which one man has no right to lay hands upon another.

1. When one man is provoked by another, in conſequence of any thing for which he has no right to lay hands upon him, and under the firſt impulſe of this provocation ſtrikes him with any thing not likely to occaſion death, and it kill him, he ought not to have ſtruck him; the offence is therefore felonious; and it is manſlaughter: but in ſtriking a man *with any thing of this kind*, the provocation is ſome degree of excuſe, it is ſufficient to ſhew that the offence is not committed from a vindictive diſpoſition, and it cannot be murder[a].

—— If one man be provoked by another, in conſequence of any act of this kind, and they quarrel and fight fairly, and one of them kill the other, the opinions and practice of mankind in ſome degree leſſen its criminality; and whether the blow be given with a deadly weapon or not, it is not ſufficient to ſhew a vindictive diſpoſition, and it is

[a] 1 Haw. 192: Foſt. 290, 291.

manſlaughter

manſlaughter only[b]. —— But in every other caſe the killing of a man with a deadly weapon for ſuch a provocation ſhews a vindictive diſpoſition, and the offender is guilty of murder[c]. —— If A whip the horſe upon which B is riding, he has no right to lay hands upon him, and if B get off, and kill A, it is ſaid to be manſlaughter, without taking any notice of the manner in which he kills him: if B kill him with any thing not likely to be fatal, it appears to me that it is manſlaughter; but if he kill him with a deadly weapon, then, I think, it is murder[d].

Two boys fought, and one of them who was beaten, and had got a bloody noſe, ran home to his father, and complained of what had happened. The father immediately ran to the place three quarters of a mile diſtant, and after he had called the boy with whom his ſon had been fighting, villain, and uſed ſome other opprobrious terms, he ſtruck him a ſingle blow on the head, and it af- Rowley's caſe.

[b] 1 Hale, 452, 453, 456. 1 Haw. 191. Foſt. 295, 297.
[c] Ante, p. 43. ſ. 10.
[d] 1 Hale, 456.

terwards

terwards occaſioned his death. He was tried, and a ſpecial verdict was found; and upon its being brought into the King's Bench, 9 Jac. it was held that he was guilty of manſlaughter, becauſe done in ſudden heat and paſſion. Lord Coke ſays, that the blow was given with a cudgel; Croke ſays it was a little cudgel; and Godbolt ſays that it was a rod; and I think it may be inferred that the blow was given with ſomething not likely to be dangerous. The father had no right to beat the boy, and if he had ſtruck him with any thing likely to occaſion death it would have been murder[e].

Provocation arising from any thing for which one man may lay hands upon another, but not kill him.

2. When one man is provoked by another, in conſequence of an act for which he may lay hands upon him, but not kill him, and under the firſt impulſe of this provocation ſtrike him, in an improper manner, with any thing not likely to occaſion death, and it kill him, he ought not to ſtrike him in this manner, the offence is therefore felonious, and it is manſlaughter. The provocation is, under theſe circumſtan-

[e] 12 Co. 87. Cro. Ja. 296. Godb. 183. Foſt. 294.

ces,

ces, ſome degree of excuſe; it is too common to ſuppoſe that it reſults from any unuſual depravity; it is ſufficient to ſhew that it does not reſult from a vindictive diſpoſition, and it therefore cannot be murder: but if the manner in which the perſon is killed be wholly accidental, and imply no blame to the perſon by whom his death is occaſioned, whether he be in a ſtate of provocation or not, it is homicide *per infortunium*[a]. —— If one man find another in the act of adultery with his wife, and in the firſt tranſport of his paſſion kill him, the provocation is of ſuch a kind, that whether he ſtrike the adulterer with a deadly weapon or not, the offence is held not to reſult from a vindictive diſpoſition, and it is manſlaughter only[b]. —— But in every other caſe the killing a man with a deadly weapon, in conſequence of a provocation ariſing from any act which falls within this ſection ſhews a vindictive diſpoſition, and the offender is guilty of murder[c].

[a] 1 Hale, 454, 474, 485, 486. 1 Haw. 176, 192. Foſt. 262, 291.

[b] 1 Hale, 486. 1 Haw. 192. Foſt. 296.

[c] Ante, p. 48. ſ. 11.

A lady

Turner's caſe. A lady made a complaint to her huſband that the boy had not cleaned her clogs. The huſband immediately, without any other provocation, took up one of the clogs, ſtruck the boy on the head, and it killed him, and it was held to be manſlaughter. A maſter has a right to correct his ſervant, but a clog is an improper thing to correct him with, and although the death is accidental it cannot be homicide *per infortunium*. Cited 9 Wm. 3[g].

Maddy's caſe. Maddy found a perſon in the act of adultery with his wife, and he immediately took up a ſtool, ſtruck him on the head, and it inſtantly occaſioned his death. Maddy was tried at Southwark, and a ſpecial verdict was found. It was removed into the King's Bench, 23 Car. 2. and the court were all of opinion that is was manſlaughter[h].

When one man attacks another and he is provoked by it and kills him. 3. If A make an attack upon B, and he is provoked by it, and in the firſt impulſe of his paſſion kill A, it is ſubject to

[g] Comb. 407. [h] Ventr. 158. Sir T. Raym. 112.

this

this conſtruction: if it appear neceſſary for B to kill him to ſave his own life it is juſtifiable: but if there be no reaſonable cauſe for B to ſuppoſe that his life is in danger, and he kill A in conſequence of the provocation, without thinking of the right of ſelf-defence, it is felonious, and B is guilty of manſlaughter. —— If, for inſtance, A pull B by the noſe[e], or if A take the wall of B, and juſtle him[f], and B is provoked by it and immediately kill him in conſequence of the provocation, he cannot have reaſonable cauſe to think that his life is in danger; the act thus committed by B is felonious, not juſtifiable, and it is manſlaughter. —— When a man is attacked he is juſtified in uſing a deadly weapon to defend himſelf, and therefore, in caſes which fall within this ſection, the act of uſing ſuch a weapon does not of itſelf imply any high degree of criminality; the circumſtances under which the offence is committed, are not ſufficient to ſhew a vindictive diſpoſition, and as the offence is ſudden, it cannot amount to murder. —— When a

[e] 1 Haw. 192. [f] 1 Hale, 455.

man

man is attacked, and he kills the perſon making the attack, without there being reaſonable cauſe to ſuppoſe that his life is in danger, it may ſometimes be difficult, if not impoſſible, to aſcertain whether he actually intend to defend himſelf, or whether he commit the offence in conſequence of the provocation; but it is not material, for under either conſtruction the offence is manſlaughter[s]. —— In every inſtance in which one man can be juſtified in killing another, the abuſe of his power makes him guilty of manſlaughter: but if one man attempt to rob another, and he kill the robber, when the robbery may be prevented without it, it is almoſt impoſſible for him to be provoked, and to kill the robber in conſequence of the provocation, without thinking of the right of ſelf-defence, and it therefore cannot fall within this ſection: and every caſe in which one man may be juſtified in killing another, which does not fall within this ſection, appears to be, in this reſpect, ſubject to the ſame conſtruction as when a man kills a robber.

[s] Ante, p. 63. ſ. 4.

Two

Two men went to Buckner's lodgings, and when they had got in, one of them took down a ſword in the ſcabbard which hung there, and drew it, and ſtood at the door to keep Buckner from going out, whilſt the other man, who was Buckner's creditor, might go and fetch a bailiff to arreſt him. Upon this there was ſome converſation between Buckner and his creditor, and Buckner took a dagger out of his pocket and ſtabbed him. He was tried at the Old Bailey; his caſe was argued in the King's Bench. M. 1655, and it was held to be manſlaughter[h]. Buckner's caſe.

Tomſon and his wife were fighting; a man endeavoured to part them, and Tomſon puſhed him away, threw him down upon an iron bar which ſerved as a grate, and it killed him. Tomſon was tried at the Old Bailey, 2 Car. 2. and a ſpecial verdict was found; it was referred to the judges, and it was held that he was guilty of manſlaughter. If this man had commanded the peace, or done any thing by which he would Tomſon's caſe.

[h] Sty, 467.

have

have been entitled to the ſame protection as a peace officer, it then would have been murder[1].

Stedman's caſe

"There being an affray in the ſtreet, one "Stedman, a foot-ſoldier, ran haſtily to- "wards the combatants. A woman ſeeing "him run in that manner, cried out— 'You will not murder the man, will you?' "Stedman replied, 'what is that to you, "you bitch?'—The woman thereupon gave "him a box on the ear, and Stedman "ſtruck her on the breaſt with the pommel "of his ſword. The woman then fled, and "Stedman purſuing her, ſtabbed her in the "back."—He was tried at the Old Bailey, April, 1704.—"Holt was at firſt of opini- "on that this was murder; a ſingle box on "the ear from a woman not being a ſufficient "provocation to kill in this manner, after "he had given her a blow in return for the "box on the ear; and it was propoſed to "have the matter found ſpecially: but it "afterwards appearing, in the progreſs of "the trial, that the woman ſtruck the ſol- "dier in the face with an iron patten, and

[1] Kel. 66.

"drew

drew a great deal of blood, it was holden clearly to be no more than manſlaughter. The ſmart of the man's wound, and the effuſion of blood, might poſſibly keep his indignation boiling to the moment of the fact[k]."

Taylor's caſe.

John Taylor, a ſerjeant in the Guards, a private, and a gardener, who were Scotchmen, were drinking together in a public houſe. Some words paſſed between the ſerjeant and Edwards who was drinking in an oppoſite box; the ſerjeant ſtruck him with a ſmall rattan-cane not bigger than a man's little finger; and the gardener ſtruck him with his fiſt: and Edwards immediately went into the yard to fetch his fellow-ſervants to turn the ſerjeant and his company out of the room. Whilſt he was gone the victualler deſired the ſerjeant to pay for his liquor and be gone, but he refuſed. At this time Smith the victualler's landlord, who had nothing to do with the ſale of the beer, coming in, he aſked what was the matter, and inſiſted that the ſerjeant ſhould

[k] Foſt. 292. - ald Bayley Appx. 1704 MSS Tracy + Denton

go out, and abuſed him. The ſerjeant was then going away without having paid for his liquor, but Smith ſeized him by the collar, and threw him againſt the ſettle. He then paid, and Smith immediately ſeized him again, and ſhoved him out of the room into a paſſage. Edwards then returned, and ſeeing Smith holding the ſerjeant by the collar he went to his aſſiſtance, and they together violently puſhed him out of the houſe: but the moment he got out, he turned round, drew his ſword, and ſtabbed Smith. Whilſt the ſerjeant was in the paſſage he ſaid, he did not mind killing an Engliſhman more than eating a meſs of crowdy. A ſpecial verdict was found; it was argued in the King's Bench 11 Geo. III. and it was held that the ſerjeant was guilty of manſlaughter only [1].

Brown's caſe. Some ſoldiers and ſome keel-men quarrelled in a public houſe at Sandgate. Between one and two o'clock in the morning they went out into the ſtreet, and a violent affray enſued; a great many people were collected together, and they joined with the

[1] 5 Burr, 2793.

keel-men.

keel-men. John Brown, one of the ſoldiers, oppoſed himſelf to the mob, and they aſſaulted him ſeveral times, and then ran from him: he kept brandiſhing his ſword, ſtriking fire with it againſt the ſtones, and calling out to the people to keep off. But a man who had nothing to do with the affray was going by, and the ſoldier ſtruck him on the head with his ſword, and it almoſt inſtantly occaſioned his death. He was about five yards from the ſoldier, he had a blue jacket on, and it was eaſy to miſtake him for one of the keel-men. It was the opinion of two witneſſes, that if the ſoldier had not drawn his ſword he would have been murdered. He was tried at the Summer Aſſizes, 1776, before Mr. Juſtice Gould, and he directed the jury that it was manſlaughter; but they found him guilty of murder, and perſiſted in their verdict. In the Michaelmas term following the evidence was ſubmitted to the conſideration of the judges, and they were clearly of opinion that it was manſlaughter. The offence is the ſame as if he had killed one of the keel-men, and as the provocation was occaſioned by the aſſault, it is ſuf-

ficient to prevent the offence from being murder[m].

Snow's caſe.

Thomas Palmer, a labourer, was thatching a barn, and William Snow, a ſhoemaker, ſtopped as he was going by. It was in the afternoon, and Snow was very much intoxicated. After ſome converſation he abuſed ſome of Palmer's relations, and in conſequence of this they quarrelled. They were going to fight, but Palmer's aunt came out, threw ſome water upon Snow, ſtruck him upon the face with her hand, and prevented their fighting. Snow then went into his own houſe, which was near, and in a few minutes came out again, and ſat himſelf down upon a bench before his garden gate, at a ſmall diſtance from the door of his houſe. Palmer finiſhed his thatching, and was returning home; and as he was going by Snow's houſe, he was ſitting upon the bench with a ſhoemaker's knife in his hand cutting the heel of a lady's ſhoe. Palmer ſaid,—"Are you not an aggravating raſ-"cal?"—Snow replied,—"What will you "be when you are got from your maſter's

[m] Caſ. C. L. 135.

"feet?"—Upon this Palmer ſeized Snow by the collar, and dragging him off the bench, they both rolled down into the cart-way. Whilſt they were ſtruggling and fighting, Snow underneath, and Palmer upon him, Palmer cried out—"You rogue, "what are you doing with that knife?"—and made an attempt to ſecure it; but Snow kept ſtriking about, and held Palmer ſo hard that he could not diſengage himſelf. He however made a vigorous effort, and drew Snow from the ground; and during this ſtruggle Snow gave a blow, and Palmer immediately exclaimed,—"I am a dead man,"—and expired. There were three wounds: one very ſmall one in his right breaſt; another in his left thigh, two inches deep, and half an inch wide; and a mortal wound in his left breaſt. Snow was tried at the Summer Aſſizes at Northampton, 1776, and the jury found him guilty of murder. The opinion of the judges was afterwards taken, and it was determined that the offence was manſlaughter only [n].

[n] Caſ. C. L. 138.

HOMICIDE *per infortunium.*

WHEN one man kills another by accident, in doing a lawful act, or in doing any act which is unlawful and *malum prohibitum*, but not *malum in se*, and he uſe reaſonable caution to prevent danger, it is Homicide *per infortunium*[a]. He was formerly puniſhed with the forfeiture of his goods; but he is now entitled to his pardon as a matter of courſe[b].

Homicide *per infortunium* is ſometimes called chance-medley; but in its proper ſignification chance-medley appears to mean the ſudden killing of any perſon in an affray, whether it be manſlaughter, homicide *per infortunium*, homicide *ſe defendendo*, or juſtifiable homicide in the execution of the law[c].

[a] Foſt. 258, 259.
[b] 1 Hale, 477.
[c] Foſt. 258, 275.

1. If

1. If a huſband be correcting his wife, a parent his child, a ſchoolmaſter his ſcholar, a maſter his apprentice or ſervant;—if two perſons be playing at foils, at cudgels, at foot-ball, or playing at any other game for their diverſion;—if a carpenter, a maſon, or any workman give warning, and afterwards throw any thing down;—if a perſon be felling a tree, and it fall;—if he be felling a tree, and the head of the hatchet come off;—if a man be riding a horſe, or driving a cart, or any other carriage;—if a byeſtander whip the horſe upon which any perſon is riding;—if a man be ſhooting at any thing and miſs his aim;—if he be ſhooting and his gun burſt; if a man throw a ſtone at a bird;—if he throw a ſtone over a houſe, without knowing that any perſon is on the other ſide;—if a man keep a bullock, or any other animal that is dangerous, and he do not know that it has this quality; or if he know it, and then keep the animal in a ſecure place;—if a man lay poiſon in any place to deſtroy vermin;—if a phyſician, ſurgeon, apothecary, or any other perſon adminiſter medicine;—and in doing any of theſe acts any perſon be killed from accident,

all that the law requires is, that there be reaſonable caution; and if that caution be uſed, it is homicide *per infortunium*[d]. —— If A be ſhooting at a mark, and after the arrow is delivered B run in the way, and is killed, it is accidental; but it is the act of B himſelf, and it therefore cannot be imputed to A[e].

2. If a man, who is not qualified, ſhoot at game, and by accident kill any perſon, it is an unlawful act, but it is *malum prohibitum*, and not *malum in ſe*; and if he uſe reaſonable caution, it cannot be more than homicide *per infortunium*[f].

3. The degree of caution which ought to be uſed does not admit of any general deſcription; and I ſhall therefore merely ſtate, that if in any given caſe, the degree of caution be as great as, under the ſame circumſtances, is uſed by perſons in general, it is ſufficient.

[d] 1 Hale, 429, 430, 431, 472, 475, 476. 1 Haw. 176, 177, 195. Foſt. 259, 263.
[e] 1 Hale, 492.
[f] 1 Hale, 476. Foſt. 259.

A deer

A deer frequenting a field of ſtanding corn, which was not within the precincts of any foreſt or chaſe, the owner ſet his ſervant, with a gun charged with bullets, to watch at a corner of the field to ſhoot it; and his maſter deſired him, when he heard any thing ruſh into the corn, to ſhoot at the place. The maſter was watching at another corner of the field; and during the night he himſelf ruſhed into the corn, and the ſervant thinking that it was the deer, ſhot and killed his maſter. He was tried at Peterborough: and a doubt aroſe whether it were manſlaughter, or homicide *per infortunium*; but the deciſion is not ſtated. I however think that ſufficient caution was uſed, and that it therefore could not be more than homicide *per infortunium*[s].

Levett's caſe.

A maid ſervant hired a woman to come and do her work after the family were in bed; and as ſhe was going, about twelve o'clock at night, to let this woman out, ſhe thought ſhe heard thieves breaking open the door, and ſhe immediately went and alarmed

[s] 1 Hale, 40, 476.

her

her master. The woman, to prevent being seen, hid herself in the buttery; and whilst the master was going about the house, to see if there were any thieves, his wife seeing somebody in the buttery, cried out—"here they "be that would undo us;"—and he thinking it to be a thief immediately went into the buttery, thrusting with a sword as he entered, and it killed this woman. He was tried at Newgate, 14 Car. and the question was, whether he were guilty of manslaughter? It was brought before the Court of King's Bench, and it was held that it was only homicide *per infortunium* [b].

Hull's case.

Several workmen were employed in building a house; and in the evening, whilst they were putting up their tools, a man was sent by the master to bring a piece of timber, which lay two stories high. He went up, and before he threw it down he called out "stand clear;" he was heard, and all the workmen except one, immediately went out of the way, and the piece of timber fell and killed this man. He was tried at the

[b] 1 Hale, 474. Cro. Car. 538.

Old

Old Bailey, January 1664: it was held by Lord Chief Juſtice Hyde that it was manſlaughter, becauſe he ought to have tied a rope to the piece of timber, or ought to have been ſure that no perſon were there; but Sir John Keling and Mr. Juſtice Wylde held that it was only miſadventure. In conſequence of this difference of opinion a ſpecial verdict was found; upon which no deciſion is ſtated; but Sir John Keling in reporting the caſe ſays, he takes the law to be clear that it is but miſadventure[1].

A man was tried upon the circuit, before Sir Michael Foſter, for the murder of his wife, which is reported by him as follows. —"Upon a Sunday morning, the man and "his wife went a mile or two from home "with ſome neighbours, to take a dinner at "the houſe of their common friend. He "carried his gun with him, hoping to meet "with ſome diverſion by the way; but be-"fore he went to dinner he diſcharged it, "and ſet it up in a private place in his "friend's houſe. After dinner he went to "church, and in the evening returned home

[1] Kel. 40.

"with

" with his wife and neighbours, bringing " his gun with him, which was carried into " the room where his wife was, ſhe having " brought it part of the way. He taking it " up, touched the trigger, and the gun went " off, and killed his wife, whom he dearly " loved. It came out in evidence, that " while the man was at church, a perſon " belonging to the family privately took the " gun, charged it, and went after ſome " game; but before the ſervice at church " was ended returned it, *loaded*, to the " place whence he took it, and where the " defendant, who was ignorant of all that " had paſſed, found it, to all appearance as " he left it. I did not inquire whether the " poor man had examined the gun before " he carried it home; but being of opinion, " upon the whole evidence, that he had rea- " ſonable grounds to believe that it was not " loaded, I directed the jury, that, if they " were of the ſame opinion, they ſhould ac- " quit him; and he was acquitted[k]."

[k] Foſt. 265.

HOMICIDE *ſe defendendo.*

WHEN one man kills another, either to ſave his own life, or to prevent the perpetration of any felony which is likely to endanger his perſon, and he has reaſonable cauſe to ſuppoſe that his life cannot be ſaved, or that the felony cannot be prevented without killing him, it is homicide *ſe defendendo*. In ſome inſtances it was formerly conſidered in ſome degree blameable, and he was ſubject to the forfeiture of his goods: in others it was wholly juſtifiable, and he was therefore entirely free from puniſhment[l]. But now, in all inſtances, he is in effect equally free from puniſhment; for in caſe of forfeiture he is now intitled to his pardon from the forfeiture, as a matter of courſe[m]. The diſtinction between the caſes which are ſubject to forfeiture, and thoſe which are

[l] 24 Hen. 8. c. 5.

[m] 1 Hale, 478.

not,

not, may admit of different opinions; but as it is not material, it may be paſſed without examination.

1. When one man kills another in his own defence, all that the law requires is, that there be reaſonable cauſe to ſuppoſe that his life could not have been ſaved without killing him; and then, whatever be the circumſtances under which it occurs, it is homicide *ſe defendendo*[a]. If two men, in their attempt to eſcape from a wreck, get upon the ſame plank, and one of them, to ſave himſelf puſh the other off, the innocence of the perſon drowned makes no difference in the conſtruction to which it is ſubject; and if there be reaſonable cauſe to ſuppoſe that his life could not have been ſaved without puſhing him off, it is homicide *ſe defendendo*[b]. —— But when an attack is made upon a man, and he has an opportunity of retreating, he cannot foretel what change the act of retreating may occaſion: and if a man have an opportunity of retreating, and he kill any perſon in his own de-

[a] 1 Hale, 478, &c. 1 Haw. 178.
[b] 1 Haw. 174.

fence,

fence, without retreating, it is a rule in law that he then cannot have reaſonable cauſe to ſuppoſe that his life cannot be ſaved without killing him; and it therefore cannot be homicide *ſe defendendo*[p]. ——

When an attack is made upon a man to commit a felony, and he kills the felon, there may be both an intent to ſave his own life, and an intent to prevent the perpetration of the felony, and the rule as to retreating is then the ſame as if he had killed him only to prevent the perpetration of the felony.

Two perſons, A and B, quarrelled, and A ſtruck B with a ſtaff, and it brought him to the ground. B got up and ran to make his eſcape; A followed to kill him; and B ran to a wall between two houſes; and perceiving that he could not ſave his own life without killing A, he took up a poll-axe, and killed him; and it was held to be homicide *ſe defendendo*. 3 Ed. 3[q].

[p] 1 Hale, 481. Ante, p. 63. ſ. 3.

[q] Fitz. Coro. 284.

Two

Two perſons, A and B, quarrelled in A's houſe, and B ſtruck him with a ſtaff upon the head, and it made a large wound. A fled to a corner of the houſe, and B followed to kill him. There was neither door nor window by which he could eſcape, and perceiving that he could not otherwiſe ſave his own life he killed him; and it was held to be homicide *ſe defendendo*. 3 Ed. 3[r].

Copſton's caſe.

Copſton and another man had malice againſt each other, and they had fought ſeveral times. They afterwards met ſuddenly in the ſtreet, near Ludgate, in London, and Copſton ſaid that he would fight him; but he refuſed, and fled to the wall as far as he could, and called the perſons who were near to witneſs it. Copſton immediately ſtruck at him, and then he killed Copſton. He was tried at Guildhall in London, 15 Eliz. and it was held to be homicide *ſe defendendo*[s].

2. When one man kills another to prevent his committing a felony, which is

[r] Fitz. Coro. 287. [s] Cromp. 27. b.

likely

likely to endanger his perſon, there is no rule as to retreating; and if there be reaſonable cauſe to ſuppoſe that the felony cannot be prevented without killing him, nothing can prevent its being homicide *ſe defendendo.* —— When one man merely ſtrikes another, his intentions may often admit of doubt, and the man attacked is then bound to retreat, that he may not miſtake the intentions of the man making the attack: but when a man intends to rob, or to commit any felony of this kind, his intentions cannot eaſily be miſtaken, and the perſon upon whom the attack is made is then juſtified in reſiſting him immediately. —— If there be an attempt to commit a robbery, a rape, or an unnatural crime, they are felonies, the commiſſion of which is likely to endanger the perſon, and they fall within the above rule. If there be an attempt to commit burglary, or arſon, they are felonies, the commiſſion of which is likely to endanger the perſon, and they alſo fall within the above rule. A man may collect together his neighbours and friends, to defend his houſe; and if they, or any of

the family, kill the felon, it is equally subject to the same rule; and if a man occupy part of a house, he has the same right to defend it as if he had possessed the whole[t].

Some thieves came to a house to rob it, and a boy who was in the house killed one of them; and it was held that he had done well. 3 Ed. 3[v].

Several men came to burn a house, and they surrounded it, and the owner of the house went out, and killed one of them; and it was held to be justifiable. 26 Ed. 3[w].

Cooper's case. A woman kept a tavern within the rules of the King's Bench prison; and at one o'clock at night A came to the house, and attempted to break open the door; he actually broke one of the hinges, and swore that he would enter and slit the woman's nose, because she was a bawd and kept a bawdy house. Cooper, who was a prisoner,

[t] 1 Haw. 445, 485, &c. 493. 1 Haw. 172. Foft. 273, 274. 4 Black. 180. Ante, p. 66, 67.
[v] Fitz. Coro. 330.
[w] 26 Ap. 28.

lodged

lodged in the houſe, reprimanded A; and A broke a window, and thruſt his rapier through the window at Cooper: but Cooper had a ſpit in his hand, and in defence of the houſe, and in defence of himſelf, he thruſt the ſpit into A's eye, and it killed him. He was tried at Southwark, 15 Car. and it was held to be juſtifiable[x].

[x] Cro. Car. 544.

HOMICIDE *in Duelling and Fighting.*

WHEN one man kills another in duelling or fighting, it is in every reſpect ſubject to the ſame general rules as other caſes of homicide.

1. When a man goes out to fight with a mind bent on revenge; or even when he goes only to preſerve his reputation; to do that which the opinions and habits of the higher claſſes of ſociety may ſometimes appear to have impoſed as a duty; yet it is an offence which nothing can excuſe or mitigate. By appealing to the ſword he becomes the avenger of his own wrongs, and although he uſe every precaution to avoid it which he thinks poſſible, yet his intent is held to be felonious: and whether he give the challenge, or whether he receive it, whether

whether he ſtrike the firſt blow or not, he is in law equally criminal [a].

A challenge was ſent by Bird to Taverner, becauſe he did not pay ſome money that was due to him. To preſerve his reputation, and not to be thought a coward, he accepted the challenge; and he wrote a letter to Taverner, appointing the time, the place, and the weapon, and ſent him a pattern of it. They met according to the appointment, which was two days after; they fought, and Taverner killed him. He was tried at bar in the Court of King's Bench, 14 Ja. and although he endeavoured to be reconciled, and although Bird would not be ſatisfied, but would be revenged by ſingle combat, yet all the four judges agreed in opinion, that Taverner was guilty of murder. In one report of the caſe it is ſaid that Taverner paid the debt, or as much as was due: in the other it is ſaid that he could not pay it, but that he promiſed to pay it as ſoon as he could [b]. Taverner's caſe.

[a] 1 Hale, 452, 453. 1 Haw. 189, 190. Foſt. 296, 297.

[b] 1 Ro. 360. 3 Bulſ. 171.

2. Whether

When the fighting is deliberate.

2. Whether the intent to fight be deliberate, or whether it be ſudden, is the principal point to be decided: but if the parties be free from paſſion at the time of fighting, however ſhort or diſtant the time between the challenge and the fighting, it is a deliberate act of the mind, and the offence cannot be leſs than murder. The parties may have been provoked againſt each other; but if the paſſion have ſubſided before the fighting;—if the parties coolly talk about other concerns,—about the convenience of the place,—or about the advantage which either party has from his ſtrength, his ſkill, or the length of his weapon,—it ſhews that he has the command of his faculties; his intent to fight is therefore held to be deliberate, and the former exiſtence of the paſſion is no excuſe. —— If any ſcheme be adopted for the purpoſe of making the intent to fight appear ſudden, the exiſtence of ſuch a ſcheme evidently ſhews that the intent to fight is deliberate, and in this caſe alſo the offence cannot be leſs than murder[a].

[a] 1 Hale, 453. 1 Haw. 190. Foſt. 296, 297.

John

John Oneby, William Gower, John Rich, and two other perſons, went to a tavern in a friendly manner; and after they had been there about two hours dice were called for. The drawer ſaid he had dice but no box, and Oneby told him to bring the pepper-box, which he did immediately. The company then began to play at hazard, and after they had played ſome time, Rich aſked if any one would ſet him three half-crowns. Gower, in a jocular manner, laid down three halfpenny pieces, and then ſaid to Rich—"I have ſet you three pieces."—Oneby at the ſame time ſet three half-crowns, and Rich won; and Oneby immediately turned round and ſaid—"it was an impertinent "thing to ſet halfpence, and that he was an "impertinent puppy for ſo doing;" and Gower replied, that "whoever called him ſo "was a raſcal." Oneby then took up a bottle and threw it violently at Gower, but it only bruſhed his perriwig as it paſſed; and Gower in return toſſed ſomething at Oneby, but it miſſed him: and they then both roſe from their ſeats, and fetched their ſwords, which hung in the room. Gower drew his ſword, but Oneby was prevented by the company Oneby's caſe.

company from drawing his: Gower then threw his ſword aſide, and the company interpoſing they ſat down again. There was no reconciliation; but after they had been ſitting about an hour, Gower ſaid to Oneby —"We have had hot words, but you were "the aggreſſor; but I think we may paſs it "over,"—and at the ſame time offered his hand; but Oneby anſwered—"*No, damn "you, I will have your blood.*"—The party then paid their reckoning, and all of them except Oneby went out of the room to go home: but the moment they were out, Oneby called out to Gower—"Young man "come back, I have ſomething to ſay to "you."—He returned, and immediately the door was flung to and ſhut, and the reſt of the company excluded. A claſhing of ſwords was heard, and Oneby gave Gower a mortal wound, of which he died the next day. At the time the company broke up, Oneby had his great coat thrown over his ſhoulders. He received three ſlight wounds in the engagement. And Gower being aſked, upon his death-bed, whether he received his wound in a manner among ſwordsmen called fair, anſwered—"I think I did."

Oneby

Oneby was tried at the Old Bailey, Feb. 12 Geo. and a ſpecial verdict was found. It was removed into the King's Bench, and after being argued there it was argued in Serjeant's Inn, and it was held by all the judges that he was guilty of murder. Oneby's ſaying that he would have his blood, and his afterwards calling him back into the room, ſhewed a deliberate deſign to kill him, and that the offence was committed from malice. There was time for his paſſion to cool; it was not a ſudden offence; and therefore the provocation was no excuſe. Gower fought and Oneby was wounded, but an interchange of blows, when there is malice, does not change the nature of the offence[c].

3. If the parties be in a ſtate of provocation, and, according to the common courſe of things, there be reaſonable time for them to become cool, between the time of the provocation and the fighting, and one of them kill the other, the continuance of the paſſion is no excuſe; it is conſidered

[c] L. Raym. 1485. Str. 765.

as

as a deliberate act of the mind; the offence is committed from malice, and it is murder[d]. —— In Oneby's case there was only an hour between the quarrel and the fighting, and yet it was held to be reasonable time for his passion to cool. —— If two men fall out in the morning, and they fight in the afternoon, and one of them be killed, this also has been held a sufficient time for them to become cool[e].

Morgan's case. A challenge was sent at nine o'clock in the evening, and the parties met and fought the next morning, and one of them was killed. The survivor was tried in the King's Bench, 8 Ja. the offence was held to be committed from malice, and he was found guilty of murder[f].

4. In duelling and fighting, as well as in other cases of murder, the construction of what is deliberate is not confined to the cases which fall within the common meaning of that word: for although the parties be in a state of provocation, and although

[d] 1 Hale, 453. 1 Haw. 190. Foft. 296, 297. [e] Kel. 27. [f] 1 Bulft. 86.

it

it be a ſudden act, yet if the manner in which a man kill his antagoniſt ſhew a vindictive diſpoſition, this diſpoſition is deliberate, and therefore the offence itſelf is held to be deliberate. —— If two men be preparing to fight, and one of them ſuddenly ſtab the other before his ſword is drawn; or if he ſuddenly take any other unfair advantage, it ſhews a vindictive diſpoſition; the offence is committed from malice, and it is murder. —— If there be any fighting after the unfair advantage is taken, and the perſon who takes it kill his antagoniſt, the ſubſequent fighting does not leſſen his criminality, and the offence is therefore ſubject to the ſame conſtruction[s].

Mawgridge's caſe.

John Mawgridge was invited to the Tower, with ſeveral other perſons, by William Cope, a lieutenant in the Guards, who was then the commanding officer. Some words paſſed between Mawgridge and a lady who was part of the company, and Mr. Cope interfered to protect her; but Mawgridge continued his abuſe, and, with an

[s] 1 Haw. 191. Foſt. 295.

intent

intent to provoke him to fight, demanded ſatisfaction of Mr. Cope. Cope ſaid, that at a convenient time and place he would be ready to give him ſatisfaction, and deſired him to be more civil or to leave the room. Mawgridge roſe up, and was going out of the room, but as he was going out, he ſnatched up a glaſs bottle, full of wine, which was ſtanding upon the table, and threw it violently at Mr. Cope. It ſtruck him upon the head, and Mawgridge, immediately, without any intermiſſion, drew his ſword, and killed him upon the ſpot. Cope did not draw his ſword; but between the little ſpace of time after Mawgridge drew his ſword, and before he made the thruſt, Mr. Cope roſe from his chair, took another bottle, which ſtood upon the table, threw it at Mawgridge, and it broke his head. Mawgridge was tried at Guildhall, July, 5 Ann. a ſpecial verdict was found: and upon its being referred to the judges, it was the opinion of all of them, except Lord Chief Juſtice Trevor, that he was guilty of murder[b]. —— Upon this caſe there, however, have been ſome doubts; but Lord

[b] Kel. 119.

Chief

Chief Juſtice Raymond, in delivering the opinion of the judges, upon a ſubſequent occaſion, ſaid,—"I take this opportunity of "declaring, that we are all of opinion that "Mawgridge's caſe is law[1]." —— If it be conſidered as a duel, the act of killing Cope before his ſword was drawn ſhews a vindictive diſpoſition; and however ſudden the offence, it is then committed from malice, and it is murder. If it be not conſidered as a duel, the killing of a man with a ſword for ſuch a provocation ſhews a vindictive diſpoſition; and under this conſtruction alſo it amounts to the ſame offence. The attack was made by Mawgridge from malice, and therefore the reſiſtance made by Cope does not make the offence leſs criminal.

5. But if the parties be in a ſtate of provocation, and in the firſt impulſe of their paſſion they fight, without taking any unfair advantage of each other, and one of them kill the other, whether they fight with deadly weapons or not, it is too com- When the fighting is ſudden.

[1] Ld. Raym. 1499. Str. 771.

mon

mon an event to ſuppoſe that it reſults from any unuſual depravity of mind; it is not ſufficient to ſhew a vindictive diſpoſition, the offence is not deliberate, and it therefore cannot amount to murder. But in law the act of fighting, when it is intended or agreed upon by both parties, even under the moſt favourable circumſtances, is conſidered as unjuſt and criminal; and if one of them kill the other it is felonious, and he is guilty of manſlaughter. —— If, for inſtance, two men fall out ſuddenly, and they agree to fight in a field, and they immediately run and fetch their weapons, and go into the field and fight, and one of them kill the other, the offence is ſudden, not deliberate, and it cannot be more than manſlaughter[a]. —— There may happen to have been a former duel between the ſame parties, and if in the ſecond duel one of the parties be killed, and this ſecond duel be occaſioned by the firſt, the time that intervenes ſhews that the offence is deliberate, and the offender will then be guilty of murder: but if this ſecond duel be not occaſioned

[a] 1 Hale, 453. 1 Haw. 191. Foſt. 295, 297.

caſioned by the firſt, the offence is then ſubject to the ſame conſtruction as if the former duel had not taken place[b].

Three men quarrelled in St. James's Park, and ſome blows paſſed between them. They immediately walked out of the park; as they were going a fourth perſon joined them; and as ſoon as they had got out they all four fought, and one of them received a wound which brought on a fever, and it occaſioned his death. It came before the Court of King's Bench, 11 Will. 3. It was held to be a ſudden offence; and that it was manſlaughter, not murder[c]. Kirk and Cage's caſe.

6. If A and B fight, and during the combat A change his intentions, and decline the fight, and the circumſtances under which he decline it, ſhew that B has reaſonable cauſe to ſuppoſe himſelf out of danger; and if after this B perſiſt, and A is compelled to kill him to ſave his own life, B is criminal in perſiſting; A is juſtified in reſiſting this criminality; and I there- When a man after fighting a little time changes his intentions, and kills the antagoniſt to ſave his own life.

[b] P. 40. [c] 12 Mod. 305.

fore

fore think it is homicide *ſe defendendo*. But if there be not reaſonable cauſe for B to ſuppoſe himſelf out of danger, and A kill him, the offence of A is then the ſame as if he had not changed his intentions, and it will be either murder or manſlaughter, according to the circumſtances of the caſe. If A deliberately go out to fight a duel with B, and kill him, it is ſaid that no circumſtances can prevent its being murder[c]; but it appears to me, that there is ſufficient reaſon for ſaying, that the killing of a man may ſometimes be juſtifiable, although the perſon killing him had before intended to have murdered him: and as duelling is not more criminal than other caſes of murder, the rule which in this reſpect extends to other caſes of murder, is I think equally applicable to duelling[d].

[c] 1 Hale, 479. 1 Haw. 179, 190.

[d] P. 38. ſ. 7.

HOMICIDE,

When committed by an Officer of Juſtice.

WHEN an officer of juſtice commits homicide, it is in every inſtance, except one, ſubject to the ſame general rules as if he had been a private perſon.

But when an officer of juſtice is reſiſted, whilſt he is engaged in the diſcharge of his duty, and there is reaſonable cauſe to ſuppoſe that his own life could not have been ſaved without killing the perſon that reſiſts him, the officer is then juſtified in killing him: he is not bound to retreat[a] as a private perſon is; and it is this which conſtitutes the above exception[b]. But if there be reaſonable cauſe to ſuppoſe that his own life

[a] 1 Hale, 481, 494. 1 Dalt. 358.

[b] P. 94. ſ. 1.

could have been ſaved without killing him, it is an abuſe of the right of ſelf-defence, the officer is then acting felonioufly, and is guilty of manſlaughter[c]: or if there be reaſonable cauſe to ſuppoſe that his life might have been ſaved without killing him, and the officer be provoked by *the reſiſtance*, and kill him in conſequence of the provocation, in this caſe alſo he is acting felonioufly, but it is then ſubject to the ſame conſtruction as if he had been a private perſon, and the offence is manſlaughter[d].

The duty which is generally executed by conſtables is ſometimes executed by other officers; but if any of theſe officers kill any perſon it is ſubject to the ſame conſtruction as if he had been killed by a conſtable.

Conſtable killed in apprehending a man for felony, or for having given a dangerous wound.

1. If a conſtable be engaged in attempting to apprehend a man who has actually committed a felony, or given a dangerous wound, and there be reaſonable cauſe to ſuppoſe that it is inevitably neceſſary to kill him to prevent his eſcape, it is the duty of the conſtable, either with or without a

[c] Ante, p. 63. ſ. 3. [d] Ante, p. 76. ſ. 3.

warrant,

warrant, to kill him; and it is juſtifiable homicide in the execution of the law[e]. But if there be reaſonable cauſe to ſuppoſe that his eſcape may be prevented without it, and the conſtable kill him, it is an abuſe of his power; he intends to diſcharge his duty, but ſtill the act is felonious, and he is guilty of manſlaughter[f]: there is no felonious intent, and it therefore cannot amount to murder.

If there be reaſonable cauſe to ſuſpect a man of felony, or of having given a dangerous wound, and he attempt to eſcape, the conſtable, either with or without a warrant, has the ſame power to kill him to prevent it as if he were actually guilty; and if the conſtable kill him it is ſubject to the ſame conſtruction[g]. But if there be no reaſonable cauſe of ſuſpicion, and the conſtable, without a warrant, attempt to apprehend the perſon ſuſpected, and kill him, it is no part of the duty of his office, and he does it at his peril. If it afterwards turn out that the perſon ſuſpected were guilty, the

[e] 1 Hale, 481, 489. 2 Hale, 77, 85, 91, 94. 118. 1 Haw. 170.
[f] 1 Hale, 489. 2 Hale, 77. Foſt. 278.
[g] 2 Hale, 85, 92, 93, 94. Doug. 359. Cald. 291. 4 Black. 292.

act of the conſtable may then be either juſtifiable homicide in the execution of the law, or it may be manſlaughter, in the ſame manner as if the conſtable had known him to have been actually guilty. But if it afterwards turn out that the man ſuſpected were innocent, the act of killing this man is conſidered as an abuſe of his power; the conſtable may intend to diſcharge his duty, but ſtill the act is felonious, and he is guilty of manſlaughter[h]. —— If a conſtable have a warrant againſt a man, upon ſuſpicion, he is bound to execute it, whether the ſuſpicion be reaſonable or not; and if he kill him in executing the warrant, it is ſubject to the ſame conſtruction as if he had been actually guilty[i].

A conſtable had a warrant to apprehend ſeveral felons, and he went, with ſeveral other perſons, and ſhewed them his warrant, and commanded them to deliver themſelves up. They refuſed and reſiſted; and in the attempt to apprehend them one of them was killed: and as he could not have been ap-

[h] 1 Hale, 490. 2 Hale, 33. [i] 2 Hale, 118. Foſt. 318.

prehended,

prehended, it was held to be juſtifiable. 3 Ed. 3[k].

Conſtable killing a man to prevent his committing a felony.

2. If a conſtable ſee a man doing any thing likely to occaſion the death of any perſon; if he ſee a man in the act of committing a burglary, a robbery, a rape, or any other felony which is likely to endanger the perſon of any one; and there be reaſonable cauſe to ſuppoſe that the life of this perſon cannot be ſaved, or that the felony cannot be prevented without killing the perſon making the attempt, it is the duty of the conſtable, either with or without a warrant, to kill him, and it is juſtifiable homicide in the execution of the law. But if A make an attack upon B, and the conſtable interfere and kill A, without having reaſonable cauſe to ſuppoſe that the life of B is in danger;—or if the conſtable kill any perſon to prevent his committing a felony, when there is reaſonable cauſe to ſuppoſe that it may be prevented without killing him;—the conſtable is then abuſing his authority; he may intend to diſcharge his duty, but ſtill the act is felonious, and he is

[k] 22 Aſſ. 55.

guilty

guilty of manſlaughter. —— If a man be committing a felony, which is not likely to endanger the perſon of any one, or if he be committing any other offence which does not amount to felony, the conſtable has no right to kill him to prevent it; and if he do interfere, and kill the offender, in this caſe alſo he is guilty of manſlaughter[l].

Conſtable killing a man in ſuppreſſing an affray.

3. If there be an affray, it is the duty of the conſtable for the diſtrict where it happens to ſuppreſs it; and if there be a reaſonable cauſe to ſuppoſe that the affray cannot be ſuppreſſed without killing a man, it is the duty of the conſtable, either with or without a warrant, to kill him, and it is juſtifiable homicide in the execution of the law[m]. But if he kill any perſon when there is reaſonable cauſe to ſuppoſe that the affray may be ſuppreſſed without killing him, it is an abuſe of his power: he may intend to diſcharge his duty, but ſtill the act is felonious, and he is guilty of manſlaughter[n]. —— If a conſtable attempt to ſuppreſs an affray out of his own diſtrict, he has no more pow-

[l] 1 Hale, 484, 485, 486. Foſt. 274. 4 Black. 180.
[m] 1 Hale, 495. 2 Haw. 23.
[n] 1 Hale, 489.

er

er than a private perſon; and if he then kill any perſon it is ſubject to the ſame conſtruction as if he had not been a conſtable *.

Conſtable killing a man in apprehending him for a miſdemeanor.

4. It is in ſome caſes the duty of a conſtable, without a warrant, to apprehend perſons guilty of miſdemeanors; and in doing this he may lay hands upon them, but he ought rather to permit their eſcape than to kill them. If a conſtable in his attempt to apprehend a man for any offence of this kind, lay hands upon him, in ſuch a manner as is not likely to occaſion an injury to his perſon, and it happen to occaſion death, it is a lawful act, executed in a lawful manner, and it is homicide *per infortunium*. But if he lay hands upon the offender in ſuch a manner as is likely to occaſion an injury to his perſon, and yet not in ſuch a manner as is likely to occaſion death, and it happen to kill him, it is a lawful act, executed in an unlawful manner; the conſtable by laying hands upon him in this manner abuſes his power; it is a felonious act, and although he intend merely to diſcharge

* 1 Hale, 459. Dalt. 35.

his

his duty, yet he is guilty of manſlaughter[p]. —— It perhaps will never happen that a conſtable, in apprehending a man for any offence of this kind, will ſtrike him with a deadly weapon, or with any thing likely to occaſion death; but if he do he will be guilty of murder[q]; for it is ſo widely different from the power he is authorized in exerciſing, that he cannot intend to diſcharge his duty as conſtable.

Private perſon killing any man in apprehending him.

5. It is in ſome caſes the duty of private perſons to endeavour to apprehend offenders, and to preſerve the peace; and whilſt they are engaged in the diſcharge of this duty they are conſidered as officers of juſtice. A conſtable may call any private perſon to his aſſiſtance, and he is bound to attend; he is then acting under the authority of the conſtable, and if he kill any perſon whilſt he is thus engaged, it is ſubject to the ſame conſtruction as if the conſtable himſelf had killed him[r]. —— A warrant from a juſtice of the peace may be directed to any private perſon, and he may execute it if he pleaſe; and if he kill any man in

[p] Hale, 485. 2 Hale, 117. Foſt. 271.
[q] Ante, p. 48. ſ. 11.
[r] 2 Hale, 86.

executing

executing it, ſtill it is ſubject to the ſame conſtruction as if he had been a conſtable[b].

A man committed murder and went away. He afterwards returned, and the conſtable going with ſeveral perſons to apprehend him, he defended himſelf with a ſword, and refuſed to deliver himſelf up, and one of the perſons who was with the conſtable ſtruck the murderer on the head with his ſword, and it was held to be juſtifiable. 3 Ed. 3[c].

When A, who is a private perſon, actually knows that a man is guilty of felony, or that he has given a dangerous wound, it is his duty, by himſelf and without a warrant, to apprehend him; and if there be reaſonable cauſe to ſuppoſe that he cannot be prevented from eſcaping without killing him, A may then kill him, and it is juſtifiable homicide in the execution of the law, in the ſame manner as if he had been a conſtable. But if there be reaſonable cauſe to ſuppoſe that his eſcape may be prevented without killing him, and A kill him, he

[b] 1 Hale, 581. 2 Hale, 110, [c] Fitz. Coro. 288.

may

may intend to discharge his duty, but still the act is felonious, and A is guilty of manslaughter[d]. —— When there is reasonable cause to suppose that a man has committed any act of this kind, a private person, by himself and without a warrant, may gently lay hands upon him to apprehend him. But if a private person kill a man in attempting to apprehend him upon suspicion, he does it at his peril. If it afterwards turn out, that the man suspected were guilty, the act of killing him may then be either justifiable or manslaughter, in the same manner as if A had actually known him to have been guilty. But if it afterwards turn out that the man suspected were innocent, A is then considered as having been guilty of an abuse of his power; he may intend to discharge his duty, but still the act of killing the man suspected is felonious, and the offence is manslaughter[e].

A thief killed a merchant, and the merchant's boy coming up immediately after-

[d] 1 Hale. 587, 588, 589. 2 Hale, 76, 77.
[e] 2 Hale, 82, 83, 119.

wards

wards killed the thief, and it was held to be juſtifiable. 26 Ed. 3[f].

When a private perſon ſees a man in the act of doing any thing likely to occaſion the death of any perſon, when he ſees a man in the act of committing a felony, he has the ſame power to interfere to defend the perſon in danger, or to prevent the felony, as if he were a conſtable; and if he kill any perſon it is ſubject to the ſame conſtruction[g]. If A lie in wait to kill B, and his ſervants go with him without knowing his intentions, and B come, and is attacked by A, and the ſervants of A ſeeing their maſter fighting go to defend him, and without attempting, by gentle means, to ſtop the fighting, the maſter and ſervants together kill B, the ſervants are guilty of manſlaughter; it was their duty to attempt to ſtop the fighting, without putting B to death; and if they do not do this they cannot have reaſonable cauſe to ſuppoſe that it is inevitably neceſſary to kill B, and it therefore cannot be juſtifiable. The ſervants go up without any improper intentions; and although the per-

[f] 26 Aſſ. 23. [g] 1 Hale, 484, 485.

ſon

ſon they defend be himſelf the criminal, yet the act thus committed by the ſervants is not committed from malice, and it therefore cannot amount to murder[h].

Several men were playing at bowls, two of them quarrelled and fought, and a third man, the friend of one of them, ſtruck the other with a bowl, and it killed him; and as it happened upon a ſudden motion in revenge of his friend, it was held 9 Ja. that he was guilty of manſlaughter[i].

Sir Matthew Cary's caſe.

Ferdinando Cary and Oſebrand were fighting, and Sir Matthew Cary, who was related to Ferdinando Cary, caſually riding by, and ſeeing them fighting, rode up, and ſtabbed Oſebrand with his ſword. It came before the Court of King's Bench, 14 Ja. and it was held that Sir Matthew was guilty of manſlaughter[k].

When there is an affray, a private perſon even by himſelf, and without a warrant, may gently lay hands upon any perſon to

[h] Plow. 101. Caſe of Saliſbury and others. Ante, p. 11.

[i] 12 Co. 87. Kel. 61, 126.

[k] 3 Bulſ. 206.

ſuppreſs

ſuppreſs it[1]: and if he kill any perſon in exerciſing this power, it is ſubject to the ſame conſtruction as when a *conſtable* kills a man in apprehending him for a miſdemeanor.

There are ſome inſtances in which a private perſon may apprehend a man who is guilty of a miſdemeanor; he may gently lay hands upon him; but he ought rather to permit his eſcape than kill him; and if he do kill any perſon, in this caſe alſo it is ſubject to the ſame conſtruction as when a *conſtable* kills a man in apprehending him for a miſdemeanor.

When a private perſon is thus engaged, it is poſſible that he may be provoked, and acting under the impulſe of that provocation may kill the offender; but if he do not exceed his authority, nothing can prevent its being juſtifiable. If a man commit a felony, or any other act for which A, who is a private perſon, may be juſtified in killing him to prevent his eſcape; or if a man be in the act of doing any thing which

[1] Dalt. 35.

will juſtify A in killing him to prevent it; and A be provoked by it, and in conſequence of the provocation, and under the firſt impulſe of his paſſion kill the offender, when the eſcape or the felony may be prevented without killing him, it is a felonious act, and A is guilty of manſlaughter: it is not juſtifiable, becauſe he exceeds his authority: the provocation ariſing from the act of the perſon killed is ſome excuſe; it is in ſome degree coupled with the power which every private perſon is in ſuch caſes authoriſed to exerciſe; a private perſon may even uſe a deadly weapon; and for theſe reaſons it is impoſſible to infer that the offence is committed from a vindictive diſpoſition; it cannot be conſidered as deliberate; and it therefore cannot amount to murder[a]. —— If a man commit a miſdemeanor, or do any act for which A, who is a private perſon, has no right to do any thing more than gently lay hands upon him, and A be provoked by the offender, and under the firſt impulſe of his paſſion lay hands upon the offender in ſuch a manner as is likely to do him a perſonal injury, but

[a] Ante, p. 79. ſ. 3.

not

not likely to kill him, A is guilty of manſlaughter: and although A ſtruck him wholly in conſequence of the provocation, yet it does not reſult from a vindictive diſpoſition; the offence is not deliberate, and it therefore cannot amount to murder[f]. But if A be provoked by the offender, and in conſequence of the provocation immediately ſtrike him with a deadly weapon, or do any thing likely to occaſion death, it is then held to reſult from a vindictive diſpoſition; and however ſudden the offence, it is held to be deliberate, and he is then guilty of murder[i]. —— It can ſeldom or perhaps never happen, that an officer of juſtice engaged in apprehending offenders, can be ſo far provoked as to forget his duty, and to kill the offender in conſequence of the provocation; but if ſuch an inſtance were to occur, it would be ſubject to the ſame conſtruction as if he had been acting as a private perſon.

Officer provoked and killing offender in conſequence of the provocation.

6. A hue and cry may be raiſed, either by a conſtable, or by any private perſon, either with or without a warrant; and

Killing a man in purſuing a hue and cry.

[f] Ante, p. 74. ſ. 2. [i] Ante, p. 48. ſ. 11.

if

if in the purſuit there be reaſonable cauſe to ſuppoſe that the eſcape of the man purſued cannot be prevented without killing him, any of the perſons who take part in the hue and cry may kill him, and it is juſtifiable homicide in the execution of the law[c]: but if there be reaſonable cauſe to ſuppoſe that his eſcape may be prevented without it, the perſon killing him is then guilty of manſlaughter[d].

Killing a man in arreſting him upon a civil proceſs.

7. When a ſheriff's officer has a warrant to arreſt a man for debt, upon any civil proceſs, he may lay hands upon the perſon to be arreſted; if a man be acting under any other civil proceſs, and any perſon attempt to prevent him from executing it, he may lay hands upon the perſon who makes this attempt; but he has no right to kill him: and if he do kill him, it is ſubject to the ſame conſtruction as when a conſtable kills a man in apprehending him for a miſdemeanor[e].

[c] 2 Hale, 103.
[d] 1 Hale, 489.
[e] 2 Hale, 83, 117, 118. Foſt. 271.

Two

Two ſheriff's officers, Reaſon and Tranter, arreſted Mr. Lutterell for ten pounds, as he was going out of his lodgings; and he deſired them to return with him, and he would pay the money. Tranter went for the attorney's bill, and Reaſon went with Mr. Lutterell into the dining-room; but ſome words paſſed as to civility-money, which Mr. Lutterell ſaid he would not pay. He went up another pair of ſtairs to deſire his lady to tell out the money, and then returned into the dining-room with two piſtols in his breaſt. He threatened the officers ſeveral times, but he was perſuaded to lay the piſtols on the table, and he laid them there, declaring that he had no deſign againſt the bailiffs, but that he brought them down becauſe he would not be forced out of his lodgings; and he then went to the fire at the other end of the room. Mr. Lutterell and Reaſon were alone when Tranter returned, and being let into the houſe, he immediately went up ſtairs to them; and the moment he entered, the boy who was following him heard a blow given. The boy haſtened into the room, and upon his entering it he found Tranter running Mr. Lutterell up againſt the cloſet door, and Rea-

Reaſon and Tranter's caſe.

VARD
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ſon ſtabbing him. Mr. Lutterell ſoon ſunk down upon the ground, as if begging for mercy, but Reaſon ſtood over him and continued ſtabbing, until he had wounded him in nine places, and it killed him. At this time the maid ſervant entered the room; and immediately after both ſhe and the boy ran out for aſſiſtance: they heard one of the piſtols fired, and ſoon afterwards a woman looking out of a window in an oppoſite houſe, ſaw Reaſon fire the other. Several perſons ſoon entered the room, and when they entered it, they found Mr. Lutterell in the place where he was lying when the maid ſervant and the boy ran out. Mr. Lutterell had a ſword by his ſide, which after the affray was found drawn and broken; but when the ſeveral perſons entered the room there was neither ſword nor piſtol near him. Mr. Lutterell had a walking-cane in his hand, and Tranter had a ſcratch on his forehead, and there was ſome probability that it was occaſioned by a blow with the cane; and that it was the blow heard by the boy as he was going up ſtairs. One of the bailiffs was ſlightly wounded in the hand by a piſtol-ſhot, and in the wriſt by a ſharp-pointed inſtrument,- and the other was ſlightly wounded

in

in the hand with a ſimilar inſtrument. They were tried at bar in the King's Bench, 8 Geo. and were found guilty of manſlaughter[h]. The bailiffs were reſiſted; they were provoked by the reſiſtance; and they appear to have committed the offence in conſequence of that provocation: in ſuch a caſe, the act of uſing deadly weapons is not ſufficient to ſhew a vindictive diſpoſition; the offence is in every reſpect to be conſidered as ſudden, and it therefore cannot amount to murder[i].

A collector of chimney-money went with a conſtable, to demand it, to the houſe of a man in Southwark. The maid ſervant was in the houſe alone; and upon their being informed that the maſter was from home; that ſhe did not know where to find him; and that ſhe could not get the money to pay them: they diſtrained a ſilver cup. The maid ſervant thinking to prevent their carrying the cup away, ſtood againſt the door where they were to go out; and the collector took her by the arm, and beat her head and back againſt the door-poſt ſeveral times, and it occaſioned her death. He was tried at bar in the King's Bench, 24 Car. 2. and Gough's caſe.

[h] 1 Str. 499. Foſt. 292. [i] Ante, p. 113, 114.

it was held that he was guilty of manſlaughter[k].

Officer killing a man in his cuſtody, or killing a man to prevent a reſcue.

8. When a man, who is actually guilty of felony, is in cuſtody, and he attempts to eſcape, it is clear that the officer is juſtified in killing him[c]; and it is ſubject to the ſame conſtruction as when a conſtable kills a felon in his attempt to apprehend him; but to what other caſes this authority extends does not appear to be mentioned. —— If a man be known to have given a dangerous wound, or if a man be ſuſpected of felony, or of having given a dangerous wound, it appears to be a principle in law that he ought to be killed rather than permitted to eſcape; and I therefore think that the officer has the ſame authority to kill him to prevent his eſcape out of cuſtody, as the conſtable has to prevent his eſcape from the arreſt. If an officer attempt to arreſt a man for a miſdemeanor, it appears to be alſo adopted as a principle, that then it is the duty of the officer to permit the eſcape rather than kill the perſon eſcaping to prevent it; and I therefore think that

[k] 1 Ventr. 216. [c] 1 Hale, 481, 490, 496.

the

the officer has no more right to kill him after the arreſt than he has before. If any other perſon attempt to reſcue a priſoner, the officer appears to have the ſame power to prevent the reſcue, as he has to prevent the eſcape if it had been attempted by the priſoner himſelf. But if a man be apprehended by A, who is a private perſon, and whilſt he is in his cuſtody he attempt to make his eſcape, or if any perſon attempt to reſcue him, then, I think, that A cannot uſe a greater degree of force to prevent it than he may uſe in apprehending him. —— If a gaoler kill his priſoner by hard uſage[f], —if a gaoler purpoſely confine a priſoner, againſt his will, in a room infected with the ſmall-pox, and he catch the infection and die[g],—it is impoſſible that the gaoler can ſuppoſe that he is acting in the diſcharge of his duty, he is conſidered but as a private perſon, and he is guilty of murder.

A gaoler went into a priſon, and the priſoners having broken off their irons, attacked him, and beat him very much; he

[f] 1 Hale, 466. caſe. Str. 853.
[g] Bambridge and Corbet's

had

had a hatchet in his hand, and he killed two of the priſoners, and then eſcaped from them; and it was held that he was not blameable. 22 Ed. 3[h].

A priſoner had been accuſtomed to walk beyond the boundaries of the priſon; the gaoler ſuſpected that there had been ſome familiarity between his wife and the priſoner; and as he was going to walk as uſual, the gaoler gave him a blow upon the head, which brought him to the ground, and occaſioned his death. The gaoler was tried at Cheſter, 32 Eliz. and it was held that he was guilty of murder[x].

Calfield's caſe.

Calfield was in the compter, in London, under an execution for debt. He made his eſcape, and the keeper coming to the place where he was he got out of the window. The keeper purſued him; and whilſt he was in the act of making reſiſtance the keeper killed him. An appeal was brought againſt him in the King's Bench, 13 Jac. and Rolle, in reporting the caſe, ſays,—

[h] 22 Aſſ. 55.

[x] Cromp. 21. f. 8.

"It

"It ſeems to me that it is manſlaughter:" but whether it received the deciſion of the court is not ſtated[i]. Sir Michael Foſter ſays that he thinks this opinion too ſevere[k]: it is however to be obſerved that it is probable that the keeper did not kill him in his own defence; but that he killed him to prevent his eſcape; and therefore the correctneſs of the opinion, ſtated by Rolle, may depend upon the queſtion, whether a gaoler have a right to kill a priſoner of this kind to prevent his eſcape. If he have this right, the act of killing Calfield may be juſtifiable homicide in the execution of the law; but if he have not, then the offence may be manſlaughter.

Huggin's caſe.

Barnes, the deputy-warden of the Fleet, carried a priſoner, againſt his will, into a new-built room in the priſon, which was over the common-ſewer, and was damp and unwholeſome. Barnes knew that the room was unwholeſome, and yet he kept the priſoner there forty-four days, without fire, chamber-pot, or cloſe-ſtool, and it occaſioned his death. About fifteen days before the priſoner's death, Huggins, the warden,

[i] 1 Roll. 189. [k] Foſt. 271.

ſaw

ſaw the priſoner in this room, and he knew it had been lately built, and that it was damp. Barnes made his eſcape, and Huggins was tried for murder, at the Old Bailey, 12 Geo. 1. and a ſpecial verdict was found. It was referred to the judges, and it was held that the offence thus committed by Barnes was murder; but that the evidence ſtated by the verdict was not ſufficient to ſhew that Huggins took any part in the offence, and he was therefore acquitted.[1]

Judge paſſing ſentence of death, or officer executing it.

9. When a miniſter of juſtice has ſome reaſon to ſuppoſe himſelf authorized, and under this authority paſſes the ſentence of the law upon any man; or when a miniſter of juſtice has ſome reaſon to ſuppoſe himſelf authorized, and in executing the ſentence puts any man to death, it is juſtifiable homicide. If the juſtices of the Common Pleas try a man on an appeal of death, by writ, and he be condemned and executed,—if a judge paſs ſentence of death againſt a man for a felony, not within his juriſdiction, and the felon be executed,—

[1] L. Raym. 1574. Str. 882.

if

if any of the juſtices of the peace condemn a man for treaſon, and he be executed,—if a man be under ſentence of death to be hung, and the officer has a warrant from the crown to behead him, and he behead him,—or if it be the cuſtom ſometimes to behead a man, inſtead of hanging him, and the officer follow the cuſtom, and behead him,—in all theſe caſes he has ſome reaſon to ſuppoſe himſelf authorized, and it is juſtifiable homicide[f]. —— But if a miniſter of juſtice put any perſon to death, and he know that he have no cauſe to ſuppoſe himſelf authorized, he is conſidered as a private perſon, and is puniſhable in the ſame manner as if he had not been a miniſter of juſtice. If, for inſtance, an officer be ordered to hang a convict, and he wilfully diſobey the order, and behead him,—if an officer be ordered to whip a man, or to brand him, and he do it to a dangerous extreme, and kill him,—if a man, without any pretence to authority, go and execute a perſon who is under ſentence of death,—if a man, without any pretence to authority, aſſume the office of a judge, and paſs ſentence of death upon

[f] 1 Hale, 496, 497, 498, 499. Foſt. 267, &c.

any perſon, and he be executed,—or if a regular officer, knowing that the judge has no pretence to authority, obey his order, and execute the man condemned,—he cannot but know that he has no ſuch authority, and he is guilty of murder[g].

Killing any perſon under the authority of particular ſtatutes.

10. There are ſome inſtances in which, under the ſtatutes for the preſervation of game[h], and under the ſtatutes for the ſuppreſſion of riots, the perſons acting under thoſe ſtatutes may be juſtified in killing the treſpaſſers, or the rioters; and the conſtruction to which it is ſubject appears to be the ſame as in other caſes, where one perſon kills another in the execution of the law. If the perſon who kills any man, under the authority of any of theſe ſtatutes, have reaſonable cauſe to ſuppoſe that his duty cannot be performed without killing him, it is juſtifiable homicide in the execution of the law. But if there be reaſonable cauſe to ſuppoſe that his duty might have been performed without it, the perſon killing him is then guilty of manſlaughter.

[g] 1 Hale, 497, 501. Foſt. 267, &c. Dalt 344.

[h] 21 Ed. 1. ſt. 2. 4 & 5 W. c. 23, ſ. 4.

HOMICIDE,

When the Perſon killed is an Officer of Juſtice.

IF an officer of juſtice be killed whilſt he is engaged in the diſcharge of his duty, and is acting legally, the offence is always murder: but if he be acting illegally, it is either manſlaughter, or homicide *ſe defendendo*.

The law has given to officers of juſtice the higeſt degree of protection in its power, by making the offence of killing them ſubject to a more ſevere conſtruction than in other caſes. The offender may think that the officer is acting illegally, he may think himſelf juſtified, but it is his duty to ſubmit; and if he wilfully kill the officer, no circumſtances, however favourable, can mitigate the offence. When a man is in a ſtate of provocation, and he ſuddenly and wilfully kill any private perſon, the offence cannot be murder, unleſs it reſult from a

vindictive diſpoſition; nor can it reſult from a vindictive diſpoſition, unleſs it be perpetrated with a deadly weapon, or with ſomething likely to occaſion death: but however ſudden the offence, or however great the paſſion, the mere act of wilfully killing an officer of juſtice, whilſt he is diſcharging his duty and acting lawfully, is held to ſhew a vindictive diſpoſition, whether it be with a deadly weapon or not; and as this diſpoſition is deliberate, the offence itſelf is alſo held to be deliberate, and it cannot be leſs than murder.

In every other reſpect, the queſtion, whether the killing an officer of juſtice be murder, manſlaughter, or any other kind of homicide, is ſubject to the ſame general rules as the killing of a private perſon.

The principal object is to aſcertain when the officer is acting legally and when he is acting illegally: and it may be ſtated generally,—that the authority under which he acts muſt be ſufficient;—he muſt make a ſufficient notification;—he muſt uſe a proper degree of force;—and then he is acting legally.

legally. But if any one of these three requisites be not complied with, he is acting illegally.

When a man assumes the authority of an officer of justice, without having any probable cause to suppose himself authorized, and he is killed; it is in every respect subject to the same construction as the killing of any other private person.—A constable's staff will not make a constable.

If an officer be acting illegally, in consequence of acting without a sufficient authority, or in consequence of not making a sufficient notification, the offence of killing him will always be manslaughter: but if he be acting illegally, in consequence of not using a proper degree of force, it is then that killing him will be either manslaughter, or homicide *se defendendo*.

When a man is guilty of felony, or has done any thing which may give officers of justice the same power over them as they have in cases of felony, the offence itself is of such a nature, and the force the officer may

may uſe is ſo unlimited, that it can ſeldom happen that he acts ſo far illegally, in conſequence of exceeding it, as to mitigate the offence of the perſon killing him. Still, however, ſuch caſes may occur; and they are ſubject to the ſame conſtruction as the following inſtance. If A be ſuſpected of felony, and he is afterwards found to be innocent, and an officer, inſtead of attempting to apprehend him, or lay hold of him, in a proper manner, immediately come up and make a thruſt at him with a ſword, and is in the act of repeating it, there can be no reaſon to ſuppoſe that he intends to diſcharge his duty as an officer: it is governed by the ſame rules as if he had not been an officer; and if A can neither retreat nor ſave his own life without killing him, it is homicide *ſe defendendo*: the officer has then forfeited the protection to which he would be entitled if acting legally; and I therefore think that A has the ſame right to kill him in his own defence, as if he had not been ſuſpected. In common an officer has no right to uſe a greater degree of force than may reaſonably appear to be neceſſary to enable him to ſecure the offender; but there

is

is a difference between exceeding this power in ſuch a manner that it may be known that he is ſtill acting as an officer, and in exceeding it to ſuch a degree as will make it neceſſary for A to kill him in his own defence: and if an officer, in apprehending A, uſe more violence than may appear to be neceſſary to ſecure him, and is not ſo outrageous but that it may be known that he is acting as an officer, and A kill him, it does not appear to be decided whether the officer is to be conſidered as acting legally or not: very powerful reaſons might be urged on both ſides; and if ſuch a caſe were to occur, it would be impoſſible to foretell the deciſion: but if it be decided that the officer was acting illegally, A will then be guilty of manſlaughter.

When an officer of juſtice is merely authorized to lay hands upon A, and inſtead of doing this he ſtrike at him with a deadly weapon, or do any thing likely to occaſion his death, it under all circumſtances is ſo widely different from his duty, that there can be no reaſon to ſuppoſe that he is acting

as

as an officer; he cannot be conſidered as acting legally; it is ſubject to the ſame conſtruction as if he had not been an officer: and if A kill him, becauſe he can neither retreat nor ſave his own life without killing him, it is homicide *ſe defendendo*. But if an officer proceed to lay hands upon A in a violent manner, but not in ſuch a manner as is likely to occaſion death, and A kill him; in this caſe alſo it appears to be undecided, whether he be ſo far acting illegally as to forfeit the protection given to officers; but if it be held to be illegal, A will then be guilty of manſlaughter.

If a man wilfully kill an officer of juſtice, and the offence is manſlaughter, it will always happen that he kills the officer to defend himſelf; or that he is provoked by the officer, and kills him in conſequence of that provocation: and it may ſometimes be difficult to aſcertain which mode of conſtruction the offence admits; but in either caſe the offender is guilty of manſlaughter, and it therefore cannot be material. —— When an officer of juſtice has any pretence or appearance of authority, it is the duty of every

every man to ſubmit, although he be acting illegally; the perſon upon whom he is exerciſing this authority muſt know, that by ſubmitting he would be out of danger from any thing the officer would do; but if inſtead of ſubmitting, he reſiſt and kill the officer, he abuſes the right of ſelf-defence; and although he intend merely to defend himſelf, yet it is a felonious act, and he is therefore guilty of manſlaughter [a]. —— Or if inſtead of intending to defend himſelf, he be provoked by the officer, and immediately kill him in conſequence of the provocation, it is a felonious act, and in this caſe alſo the offender is guilty of manſlaughter: and whether it be committed with a deadly weapon or not, the provocation is ſufficient to ſhew, that it does not reſult from a vindictive diſpoſition; and as it is a ſudden offence, it cannot amount to murder [b].

An officer of juſtice is as much under the protection of the law whilſt he is going and returning, as when he is actually engaged in apprehending the offenders; and if he be

[a] Ante, p. 63. [b] Ante, p. 76.

killed either in going, returning, or in making the arreſt, it is equally criminal.

It is in ſome caſes the duty of officers of juſtice to make a notification to the perſon they intend to apprehend; but if he already know all that the officer has to notify, it is then unneceſſary; and if the officer be killed, without having made the notification, the offence is then the ſame as if it had been actually made. —— It may ſometimes happen that the officer may be killed before he has an opportunity of making the notification; but in this caſe alſo the offence is the ſame as if it had actually been made.

In addition to the notification of his intentions, an officer is, in ſome inſtances, alſo bound to notify his office: but if he do or ſay any thing by which this may be known, it is all that is required. If, for inſtance, a conſtable produce his ſtaff,—if he command an offender to deliver himſelf up,—or if he ſay any thing by which the offender may know that he intends to apprehend him,—it is a ſufficient notification

of his intentions. If a conſtable produce his ſtaff,—or if he ſay any thing by which the offender may know that he is a conſtable,—it is a ſufficient notification of his office[c].

When a man is juſtified in breaking open the doors of a houſe, he may break open the windows; and if he be killed in doing it, the offence is ſubject to the ſame conſtruction as if he had broken open the door.

It is not within the plan of this work to deſcribe the duty of all the different officers engaged in the execution of the law; but I ſhall confine myſelf to thoſe inſtances which are moſt likely to occur, and which require explanation: and the rules by which theſe inſtances are governed, will, in general, ſufficiently explain the law as to any other caſes which may occur.

Conſtable killed in apprehending a felon, or a man who has given a dangerous wound.

1. A conſtable, *virtute officii*, may apprehend a man who has committed a felony, or given a dangerous wound; but if the offender do not know his intentions, it is then

[c] 1 Hale, 461. Foſt. 311.

the duty of the conſtable to notify them[a]. It is not neceſſary for him to notify that he is a conſtable: he may apprehend the offender in any place, although it be out of his own diſtrict, or even out of the county, for a private perſon may do this, and the authority of a conſtable cannot be leſs than that of a private perſon: he may uſe any degree of force, or even kill the offender, if there be reaſonable cauſe to ſuppoſe that his eſcape cannot be prevented without it[c]. If the offender eſcape into a houſe, all that is required is that the conſtable notify his buſineſs, and demand admittance; and if it be refuſed, he may break open the doors to apprehend him[d]: a private perſon may break open doors, after notifying his intentions, and demanding admittance: more cannot be required from a conſtable: and I therefore think that it cannot be neceſſary that he ſhould be within his own vill, or that he ſhould notify that he is a conſtable. Under theſe circumſtances the conſtable is acting legally, and if he be wilfully killed the offender is guilty of murder.—But if the

[a] 1 Hale, 461.
2 Hale, 85, 90, 94.
Foſt. 310, 311. Kel. 66.

[c] Ante, p. 114.

[d] 1 Hale, 589.
2 Hale, 90, 94.

conſtable

conſtable attempt to apprehend an offender of this kind without making the neceſſary notification,—if he uſe a greater degree of force than is neceſſary,—if he attempt to break open the doors of a houſe without making the neceſſary notification, or attempt to break them open when he is not refuſed admittance,—or if he attempt to break open a wrong houſe,—the conſtable is then acting illegally, and if he be wilfully killed, it will either be manſlaughter, or homicide *ſe defendendo*[e].

In caſes of ſuſpicion, there have been different opinions as to the power of the conſtable: but I think it may now be conſidered as law, that if there be reaſonable cauſe for the ſuſpicion, it is always the duty of the conſtable, *virtute officii*, to apprehend the perſon ſuſpected; and that it can make no difference whether the ſuſpicion ariſe from facts within his own knowledge, or from the information he may receive from others. —— A went to a conſtable and charged B with having ſtolen ſome laces from him; and he ſaid they were Smith v. Payne & al.

[e] Foſt. 312, Kel. 66. Ante, p. 141, &c.

in

in B's houſe; a ſearch-warrant was granted, and the conſtable went to B's houſe; the goods were not found, but the conſtable apprehended B, although there was no warrant for that purpoſe, and he was brought before a magiſtrate and diſcharged. An action was brought, in the King's Bench, againſt the conſtable for falſe impriſonment; and it was held, 20 Geo. 3. that the charge was a ſufficient cauſe of ſuſpicion, and that the conſtable was juſtifiable in apprehending him[d]. —— A loſt a bale of linen, and he and another man went to one of the marſhal-men of the city of London; and this man told the marſhal-man, that B called a coach at a public-houſe, and put a bale of linen into it; that B put his head into the coach; that it afterwards ſtopped at another houſe; and that B met it there. Some little time after A, in conſequence of theſe ſuſpicious circumſtances, went again to the marſhal-man; and then the marſhal-man, without any further information, went with him to apprehend B. They did not charge him with the felony, but A ſaid—"I have "loſt ſome cloth; I don't ſay it was he

Ledwith v. Catchpole.

[d] Doug. 359.

"who

"who ſtole it. I know nothing of that; "but ſtolen it was."—B aſked the marſhal-man what authority he had to apprehend him, and he produced his hanger, and ſaid that was his authority; and he then took B to priſon. But on the next day he was brought before the ſitting alderman and diſcharged. An action was brought in the King's Bench againſt the marſhal-man for falſe impriſonment; and it was held, 23 Geo. 3. that there was a reaſonable cauſe of ſuſpicion, and that the marſhal-man was juſtified in apprehending him. Lord Mansfield ſaid—"Felons are uſually taken up "upon deſcriptions in advertiſements. Up-"on a highway robbery being committed, "upon an alarm ſpread, particulars circu-"lated; and in the caſe of crimes ſtill "more ſerious, upon notice given to all "the ſea ports, it would be a terrible thing "if, under probable cauſe, an arreſt could "not be made[e]." —— When a conſtable attempts to apprehend a man upon ſuſpicion of having committed a felony, or of having given a dangerous wound, and he does not know the conſtable's intentions,

[e] Cald. 291.

they

they muſt then be notified. The conſtable may uſe any degree of force, or even kill the perſon ſuſpected, if his eſcape cannot be prevented without it; but the conſtable has no authority to apprehend him unleſs it be within his own diſtrict; for out of his own diſtrict he is but a private perſon; and as he has not this power as a private perſon, he cannot have it as conſtable. If it be in the day, every perſon is bound to take notice that he is the conſtable, and he therefore need not notify it; but if it be in the night, and the perſon ſuſpected do not know it, he is then bound to notify his intentions, and that he is a conſtable: but it is to be obſerved, that if he ſay that he is the conſtable, it of itſelf ſufficiently ſhews both his intentions and his office[f]. If the perſon ſuſpected get into a houſe, the conſtable ought to demand admittance, and if it be refuſed, he may break open the doors to apprehend him: in this caſe alſo, if the perſon ſuſpected do not know the conſtable's intentions, he muſt notify them; and if it be in the day nothing more is required: but if it be in the night, and the perſon ſuſ-

[f] 1 Hale, 461, 463. 2 Hale, 91, &c.

pected

pected do not know it; the conſtable muſt then both notify his intentions, and that he is the conſtable[g]. Under theſe circumſtances the conſtable is acting legally; and if the perſon ſuſpected wilfully kill him, he is guilty of murder. It is ſaid, that upon ſuſpicion the doors of a houſe cannot be broken open without a warrant[h]: but I have not found any deciſion in ſupport of this opinion; and until ſuch a deciſion takes place this cannot, as I conceive, be admitted as law, in oppoſition to the authorities upon which the contrary opinion is founded. But if the conſtable attempt to apprehend a man for felony, or for having given a dangerous wound, without having a reaſonable cauſe for the ſuſpicion;—if the conſtable attempt to apprehend a perſon ſuſpected when he is out of his diſtrict;—if he attempt to apprehend him without making the neceſſary notification;—or if he uſe a greater degree of force than is neceſſary;—if the conſtable attempt to break open the doors of a houſe which is out of his diſtrict;—if he attempt to break them

[g] 1 Hale, 583.
2 Hale, 91, &c.

[h] Foſt. 321. 1 Haw. 184.

open

open without making the neceſſary notification;—or if he attempt to break open a wrong houſe;—in theſe caſes the conſtable is acting illegally; and if any perſon wilfully kill him, it is either manſlaughter or homicide *ſe defendendo*[i]. —— If the perſon ſuſpected be apprehended, and he afterwards get away, the conſtable may then apprehend him again, or he may break open the doors of a houſe for that purpoſe, although it be out of his diſtrict, or even in a different county[k].

Conſtable killed in attempting to prevent a felony.

2. If a conſtable ſee a man doing any thing likely to occaſion the death of any perſon,—if a conſtable ſee a man in the act of committing a burglary, a robbery, a rape, or any other felony likely to endanger the perſon of any one, it is his duty, *virtute officii*, to interfere to prevent it; he muſt make the ſame notification, and he has the ſame power as when he is engaged in apprehending a man known to be a felon; and if the conſtable be wilfully killed whilſt he is thus engaged, he is acting legally, and the perſon killing him is guil-

[i] Ante, p. 141, &c. [k] 2 Hale, 94.

ty

ty of murder. But if A make an attack upon B, and a conſtable interfere, and kill A to defend B, when there is reaſonable cauſe to ſuppoſe that B may be ſafe without it;—if a conſtable ſee a man in the act of committing a felony, and he kill him to prevent it, when there is reaſonable cauſe to ſuppoſe it may be prevented without killing him;—if there be an attempt to commit a felony which is not likely to endanger the perſon of any one;—or if there be an attempt to commit a miſdemeanor only;—and the conſtable interfere, and kill him to prevent it;—in theſe inſtances the conſtable is acting illegally; and if he be killed, the perſon killing him is guilty of manſlaughter. Or if it be actually neceſſary for the conſtable to interfere, and he interfere without making the neceſſary notification;—if he exceed his authority,—or uſe a greater degree of force than is neceſſary,—in theſe caſes alſo he is acting illegally; and if he be killed, it is either manſlaughter or homicide *ſe defendendo*, in the ſame manner as when a conſtable is killed in apprehending a man known to be a felon[c].

[c] 1 Hale, 484, 485. Foſt. 274. 4 Black. 180.

3. If

Conſtable killed in ſuppreſſing an affray.

3. If there be an affray, it is the duty of a conſtable to interfere to ſuppreſs it. He may attempt to ſuppreſs it, by gently laying hands upon any of the affrayers; and if they do not know his intentions, all that is required is that the conſtable notify them; a private perſon has alſo this power, and therefore whether the affray be within his own diſtrict or not it is equally legal for the conſtable to interfere. A conſtable may alſo attempt to ſuppreſs the affray, by uſing ſuch a degree of force as is likely to kill or to hurt; and if the affrayers do not know his intentions, he is then bound to notify them. He has no authority to ſuppreſs an affray, by uſing ſuch a degree of force as this, unleſs it be within his diſtrict; and if it be in the day, and within his own diſtrict, every perſon ought to take notice that he is the conſtable, and the notification of his intentions is then all that is required: but if it be in the night, and the affrayers do not know his intentions and his authority, he muſt then notify them, and muſt alſo notify that he is the conſtable. The conſtable is then acting legally;

gally; and if he be wilfully killed, the perſon killing him is guilty of murder[f]. But if the conſtable lay hands upon any of the affrayers, in ſuch a manner as is likely to kill or to hurt, when the affray may be ſuppreſſed without it;—if he attempt to ſuppreſs an affray in this manner, when he is out of his own diſtrict[g];—if he uſe a greater degree of force than is neceſſary;—or if he omit the neceſſary notifications;—he is acting illegally, and if he be killed, it will be either manſlaughter or homicide *ſe defendendo*[i]. —— If any perſons come and join in an affray, whilſt the conſtable is engaged in ſuppreſſing it, he muſt notify his intentions and his authority in the ſame manner as if the affray had been began by theſe perſons; and if any of them kill the conſtable, the offence is ſubject to the ſame conſtruction[h]. —— After an affray the conſtable has no right, without a warrant, to apprehend any of the affrayers, unleſs a dangerous wound have been given; and if the conſtable be killed in apprehending a man who has given

[f] 1 Hale, 461. 2 Haw. 23. Foſt. 311.
[g] 1 Hale, 459.
[i] 1 Ante, p. 141, &c.
[h] 1 Hale, 438, 446.

a dan-

a dangerous wound, the offence falls within the first section[i]. —— If two constables go to suppress an affray, and they take different sides, and both of them command the peace, and persist in the affray, both the constables are acting illegally; and if one of them be killed it cannot be more than manslaughter[k].

If there be an affray in a house, it is the duty of the constable to demand admittance to suppress it; and if it be refused, he may break open the doors; but he has no authority to do this out of his own district. If it be in the day he has only to notify his intentions: if it be in the night, he must both notify his intentions, and that he is the constable[l]. — But if the constable attempt to break open a house when he may get admittance without it:—if he attempt to break open a house *which is not within his district*;—or if he make the attempt without the necessary notification;—he is then acting illegally; and if he be killed it will

[i] 2 Hale, 90.
[k] 1 Hale. 460.
[l] 1 Hale, 589. 2 Hale, 95. 2 Haw. 184.

be

be either manslaughter, or homicide *se defendendo*[m].

4. A constable, in several cases of misdemeanors, and other offences below felony, may, *virtute officii*, apprehend the offenders; but in all cases of this kind he has no right to use such a degree of force as is likely to kill or to hurt[n]. The constable has no right, without a warrant, to apprehend an offender of this kind, unless it be within his own district; but he must notify his intentions. If he make the attempt during the day, the notification of his intentions is all that is required: if it be in the night he is then bound to notify both his intentions, and that he is the constable. He is then acting legally; and if he be wilfully killed, it is murder. But if he use such a degree of force as is likely to kill or to hurt;—if he attempt to make the arrest out of his own district,—or if he do not make the necessary notifications,—he is acting illegally: and if he be killed it will be either manslaughter, or justifiable homicide *se defendendo*[o]. —— A constable has no

Constable killed in apprehending a man for a misdemeanor.

[m] Ante, p. 141, &c.
[n] 2 Hale, 117. Fost. 271.
[o] Ante, p. 141, &c.

right,

right, without a warrant, to apprehend a man upon ſuſpicion of having committed any offence of this kind; nor has he any right to break open the doors of a houſe, and if he be killed in making ſuch an attempt, in this caſe alſo it will be either manſlaughter or homicide *ſe defendendo*[p].

Private perſon killed in apprehending offenders.

5. When a private perſon is acting as an aſſiſtant to a conſtable, he is entitled to the ſame protection as the conſtable himſelf, and if he be wilfully killed it is ſubject to the ſame conſtruction[a] —— When a private perſon actually knows that a man is guilty of felony, or that he is guilty of having given a dangerous wound, he may apprehend him; or if he eſcape into a houſe a private perſon may break open the doors to apprehend him; and if he be killed, it is in every reſpect ſubject to the ſame conſtruction as if he were a conſtable[b]. But if a private perſon attempt to apprehend a man who is ſuſpected of an offence of this kind, or attempt to break open the doors of a houſe to apprehend him, he does it at his

[p] Ante, p. 141, &c.
[a] 1 Hale, 463. Foſt. 309.
[b] Foſt. 309.

peril.

peril. If the perſon ſuſpected be found to be not guilty, the attempt to apprehend him, or to break open the doors, is illegal; and if the private perſon who thus makes the attempt be killed, it will be either manſlaughter or homicide *ſe defendendo*, but it cannot be murder[c]. If, however, the perſon ſuſpected be actually guilty, the act of killing this private perſon is ſubject to the ſame conſtruction as if he were a conſtable, and it may then be either murder, manſlaughter, or homicide *ſe defendendo*. —— If A be in the act of killing a man, or if he be committing a felony likely to endanger the perſon of any one, it is the duty of a private perſon to interfere to prevent it; or if it be in a houſe he may break open the doors for that purpoſe; and if he be killed, it is alſo ſubject to the ſame conſtruction as if he were a conſtable[d]. —— If there be an affray, he may lay hands upon any of the party, but not in ſuch manner as is likely to kill or to hurt them; and if he be wilfully killed, in this caſe alſo it is ſubject to the ſame conſtruction as if the conſtable had been killed in

[c] Ante, p. 141, &c. [d] Ante, p. 80. Kel. 66.

doing it. But in ſuppreſſing an affray, a private perſon has no right to uſe ſuch a degree of force as is likely to kill or to hurt[f], nor has he any right to break open the doors of a houſe; and if he attempt to ſuppreſs an affray by doing either of theſe acts, he is acting illegally; and if he be wilfully killed, it will be either manſlaughter, or homicide *ſe defendendo*[g]. —— There are ſome inſtances in which a private perſon may be juſtified in apprehending a man for a miſdemeanor; he may then apprehend him in any place; but in every other reſpect, the act of killing a private perſon, when he is thus engaged is ſubject to the ſame conſtruction as if he were a conſtable. But, in general, a private perſon cannot be juſtified in apprehending a man for any offence of this kind; and if he do attempt it, and be killed, in this caſe alſo he is acting illegally, and it will be either manſlaughter, or homicide *ſe defendendo*[h].

Perſon killed in purſuing a hue and cry.

6. When a hue and cry is raiſed, and any perſon purſuing it is killed, whether it

[f] Dalt. 35.
[g] Ante, p. 141, &c.
[h] Ante, p. 141, &c.

be

be an officer of juſtice or a private perſon, whether the hue and cry be raiſed for a felony, for a miſdemeanor, or upon ſuſpicion only, whether it be in one county or in another, it is equally legal; and it makes no difference as to the conſtruction of the offence of killing this perſon. If the perſon purſued do not know the intentions of the purſuers, it is their duty to notify them; they may uſe any degree of force, and if it be neceſſary to prevent his eſcape they may even kill him: if the perſon purſued eſcape into a houſe, the purſuers ought to notify their intentions, and demand admittance, and if it be refuſed they may break open the doors. The purſuers are then acting legally, and if any of them be wilfully killed it is murder[d]. But if they omit to notify their intentions;—if they uſe a greater degree of force than is neceſſary;—if they break open the doors of a houſe when they can get admittance without it;—or if they break open a houſe into which the perſon purſued did not eſcape;—they are acting illegally; and

[d] 1 Hale, 464, 465. Foſt. 309.
2 Hale, 98, &c.

if any of them be killed, it will be either manſlaughter or homicide *ſe defendendo*[h].

Jackſon's caſe.

Jackſon and four other perſons committed a highway robbery upon Hounſlow-Heath. A hue and cry was raiſed, and the robbers purſued; and in a field at Hampſtead Jackſon turned upon his purſuers, and refuſing to yield killed one of them. He was tried at Newgate, 26 Car. 2. five of the judges were preſent, and it was held to be murder[i].

Perſon killed in executing a warrant upon a criminal charge.

7. When a warrant is iſſued againſt a man for felony, or for any of thoſe offences for which he may be apprehended without a warrant, and a conſtable, or any other officer, or a private perſon, is killed whilſt he is engaged in executing it, he has the ſame authority without the warrant as with it; and whether the warrant be legal or not, it can make no difference in the conſtruction to which the offence of killing him is ſubject.

[h] Ante, p. 141, &c. [i] 1 Hale, 464.

When

When a warrant is iſſued againſt a man for any thing for which he cannot be apprehended without a warrant, and any perſon is wilfully killed whilſt he is engaged in executing it, he is entitled to the ſame protection as in other caſes. If he be acting under a ſufficient authority,—if he make the neceſſary notifications,—if he uſe the proper degree of force,—he is acting legally, and the offence is murder. But if his authority be not ſufficient,—if he omit the neceſſary notifications,—if he uſe more force than is neceſſary,—he is acting illegally, and the killing of him will be either manſlaughter, or homicide *ſe defendendo*[k].

The warrants upon which offenders are generally apprehended, are iſſued by juſtices of the peace, and they are the only warrants I ſhall mention: it is, however, to be obſerved, that the rules, as to warrants iſſued by juſtices of the peace, are generally applicable to warrants of every other deſcription.

[k] Ante, p. 141, &c.

A war-

A warrant may be directed to an officer of juſtice, and he may take other perſons to aſſiſt him; and both he and his aſſiſtants are equally under the protection of the law. A warrant may be directed to any private perſon, and if he execute it he is conſidered as an officer of juſtice, and is under the ſame protection: but he may chooſe whether he will execute it or not[1].

By the 24 Geo. 2. c. 24. a conſtable is not liable to be ſued for any thing he may do in obedience to a warrant, under the hand or ſeal of a juſtice of the peace. But if a juſtice iſſue a warrant for any thing which is not within his juriſdiction, and the conſtable be wilfully killed in his attempt to execute it, there may be ſome doubt whether he can be conſidered as acting legally or not. There is, however, ſome difference between exempting the conſtable from an action for any act he may commit, and making that act legal; and I therefore think, that, as applied to homicide, the ſtatute does not affect the rules by which the

[1] 1 Hale, 459, 580, 581. 2 Hale, 110.

legality

legality or illegality of the act committed by the conſtable is to be decided.

Whether the charge for which the warrant iſſued be within the juriſdiction of the juſtice or not, may ſometimes admit of doubt: and if the perſon to whom the warrant is directed, fairly exerciſe his judgment, and execute the warrant becauſe he thinks it his duty, no blame attaches to him, and I think that he is then to be conſidered as acting legally, and is entitled to the fulleſt protection of the law. But if there be probable cauſe to ſuppoſe, that the charge for which the warrant iſſued be not within the juriſdiction of the juſtice, and he execute it, he is acting illegally, and I think that he then forfeits the protection to which he would be otherwiſe entitled. —— If the warrant be informal only, and not void,—if, for inſtance, the charge for which it iſſues be inaccurately ſtated,—or if the warrant be againſt a man to anſwer ſuch matters as ſhall be brought againſt him, without expreſſing any particular charge,—yet, as applied to homicide, it is to be conſidered as legal for the perſon to whom it is

directed to execute it[m]. —— If the warrant be obtained by groſs impoſition on the magiſtrate, or by information which is falſe, in this caſe alſo it is equally legal for the perſon to whom it is directed to execute it[n]. —— But if the warrant be void,—if, for inſtance, it be without the hand and ſeal of the juſtice,—if it do not expreſs the name of the perſon againſt whom it is iſſued,—or if a blank be left that the name of this perſon may be inſerted afterwards,—the warrant is then no authority, and the perſon executing it is acting illegally[o]. —— A general warrant to apprehend all perſons ſuſpected is alſo void, except in thoſe caſes in which it is authorized by act of parliament[p].

When a warrant is iſſued againſt a man for any charge for which there is no power to apprehend him without a warrant, he may be apprehended in any place within the juriſdiction of the juſtice; or in any other place if the warrant be indorſed by one of

[m] 1 Hale, 460, 578. 2 Hale, 111.
[n] Foſt. 312.
[o] 1 Hale, 577. 2 Hale, 111.
[p] 1 Hale, 580. 2 Hale, 112.

the

the juſtices for that diſtrict. But if a man execute a warrant out of the juriſdiction of the juſtice by whom it was iſſued, and without having it indorſed, the warrant is no authority, and he is then acting illegally [q].

—— If a warrant be iſſued againſt a man for felony, or for any other offence for which he may be apprehended without a warrant, the perſon apprehending him is as much juſtified in doing it in one county as in another; and whether he have a warrant or not, makes no difference in the conſtruction to which the offence of killing him is ſubject.

If a warrant be directed to A, who is a conſtable, or any other peace officer, and he attempt to make the arreſt in the day, and within his own diſtrict, and the perſon againſt whom it is directed does not know it, A muſt then notify that he intends to apprehend him: but A is then conſidered as a bailiff *jurus et conus*; he is not bound to give any notification of his warrant, nor is

[q] 1 Hale, 459, 581.
2 Hale, 110, 115.
3 Haw. 182.
23 Geo. 2. c. 26.
24 Geo. 2. c. 55.
13 Geo. 3. c. 31.

he

he bound to ſhew it, although it be demanded. But if it be in the night, or if A be out of his own diſtrict, A is then bound to make a notification of his intentions; and if it be demanded he is alſo bound to ſhew his warrant. —— If the warrant be directed to a private perſon, and the perſon to be apprehended does not know it, this private perſon is then bound to make a notification of his intentions; and, if it be demanded, to ſhew his warrant. The perſon executing the warrant is then acting legally: but if he omit the neceſſary notification, or if he refuſe to ſhew his warrant, when it is neceſſary, and when it is demanded, he is acting illegally[1].

When a warrant is iſſued againſt a man for any charge for which he cannot be apprehended without a warrant, there does not appear to be any inſtance in which the perſon to whom the warrant is directed, can be juſtified in uſing ſuch a degree of force as is likely to do him a perſonal injury: he may gently lay hands upon him; but if he do him a perſonal injury he is acting illegally.

[1] 1 Hale, 461, 463. 2 Hale, 116. 3 Haw. 182.

gally. —— If a warrant be iſſued againſt a man for any charge upon which he cannot be apprehended without a warrant, there are ſome caſes in which the perſon to whom it is directed may break open the doors of a houſe to execute it[1]. If, for inſtance, a warrant iſſue againſt a man for a breach of the peace, or to find ſecurities to keep the peace, it is legal; but if it iſſue for any charge for which there is not this right, the act of breaking open the doors is then illegal. —— If a warrant be directed to A, who is a conſtable, or any other peace officer, for any charge for which he may break open the doors of a houſe, and the perſons in the houſe do not know his intentions, A muſt then notify them, and demand admittance; but if it be in the day, and A be within his own diſtrict, it is not neceſſary for him to ſhew his warrant, although it be demanded. If it be in the night, or if it be out of his own diſtrict, A muſt then both notify his intentions, demand admittance, and, if required, muſt ſhew his warrant. —— If the warrant be directed to a private perſon, and the perſon to be appre-

[1] 1 Hale, 459, 582. 2 Hale, 117. Foſt. 136.

hended

hended does not know it, this private perſon is always bound to notify his intentions, and to demand admittance, and to ſhew his warrant if it be required. The act of breaking open the houſe is then, in every reſpect, legal; but if the officer, or the perſon to whom the warrant is directed, attempt to break it open when he can get in without,—if he attempt to break open a wrong houſe,—if he do not make the neceſſary notification,—or if he refuſe to ſhew his warrant when it is neceſſary, and when it is demanded,—he is acting illegally [t].

A warrant was obtained againſt A and a number of other perſons for a riot. They were aſſembled at a houſe, and the conſtable, with about twenty perſons, whom he had called to his aſſiſtance, went with the warrant to the houſe, and demanded admittance, and acquainted ſome of the perſons within that he was the conſtable, and had a warrant from a juſtice of the peace to apprehend them. A perſon came out of the houſe and read the warrant, and as he returned he commanded the company

[t] 1 Hale, 461, 463. 2 Hale, 116. 3 Haw. 182.

within

within to ſtand to their ſtaves. Upon this the conſtable and his aſſiſtants fearing miſchief went away. When they had got about five rods from the door, about fourteen perſons came out of the houſe, and purſued the conſtable and his aſſiſtants: the conſtable commanded the peace, but they fell on, killed one of the aſſiſtants, wounded ſeveral others, and then returned. They were tried at bar in the Court of King's Bench, 24 and 25 Car. 2. and nine of them were found guilty of murder [v].

Richard Curtis' caſe.

"A proceſs, in the nature of a *capias ad* "*ſatisfaciendum*, iſſued againſt one Charles "Cowling, out of the Town Court,"—of Newcaſtle,—"directed to Joſeph Dixon, a "ſerjeant at mace belonging to the court; "who got John Suretees, another ſerjeant "at mace, to go and execute it for him. "Suretees accordingly went to Cowling's "workſhop adjoining to his houſe, and, "taking hold of him, told him that he had "an execution againſt him. Cowling de-"manded a ſight of the proceſs; which be-

[v] 1 Hale, 462.

" ing refuſed, Cowling with the aſſiſtance of
" the priſoner,"—Richard Curtis,—" by
" force and violence reſcued himſelf. Sure-
" tees immediately acquainted Dixon with
" what had happened; and thereupon Dix-
" on prevailed upon the mayor's officer to
" inſert the name of Suretees in the proceſs:
" and Suretees then went before a juſtice of
" the peace for the town and county, and
" made information, on oath, that he did,
" by virtue of the ſaid proceſs, to him and
" Joſeph Dixon directed, apprehend the
" ſaid Cowling, who, by wreſtling and
" ſtrokes, got out of his hands and made
" his eſcape. The juſtice thereupon grant-
" ed a warrant, directed to all ſerjeants at
" mace, conſtables, and other officers with-
" in the ſaid town and county, reciting the
" proceſs already mentioned, that Suretees
" had that day arreſted Cowling by virtue
" thereof, and that Cowling had, by wreſt-
" ling and ſtrokes, reſcued himſelf, and
" commanding all officers, &c. to appre-
" hend the ſaid Cowling, and to bring him
" before the juſtice who granted the war-
" rant, or any other juſtice of the peace of
" the town and county, to be dealt with in

" the

"the premiſes as the law directeth. Upon "the receipt of this warrant, Dixon and "Suretees (who were both ſerjeants at mace) "went back to Cowling's workſhop, taking "with them the deceaſed and one Coulſon "as their aſſiſtants. They found the ſhop-"door ſhut, and calling to Cowling, who "was there with the priſoner, informed him "that they had an eſcape warrant againſt "him, and required him to ſurrender; "otherwiſe they ſaid they would break open "the door. Cowling refuſed to ſurrender; "and the priſoner, looking out at a win-"dow, with an ax in his hand, ſwore that "the firſt man that entered ſhould be a dead "man. Dixon, however, with Coulſon "and the deceaſed, broke open the ſhop-"door; and the deceaſed being foremoſt in "entering the ſhop, the priſoner, at one "blow with the axe, on the left ſide of the "head, killed him on the ſpot."—He was tried at Newcaſtle-upon-Tyne, Summer aſſizes, 1756, and was found guilty of murder. It was afterwards referred to the judges, and nine of them were of opinion that it was murder; two of them thought it was manſlaughter. Juſtice Wilmot was abſent,

abſent, but he concurred with the judges who thought it was murder. —— If a warrant, obtained under fraudulent circumſtances like theſe, were directed to a man who was a party to the fraud, and he were killed in executing it, I do not conceive how it could be conſidered as a legal warrant; for it would be his duty, inſtead of executing the warrant, to return to the magiſtrate, and make a diſcovery of the fraud. But if, as it probably was in the above caſe, a perſon had been killed who knew nothing of the fraud, or if the warrant had been directed to a perſon who knew nothing of the fraud; as to him it would be a legal warrant, and he would be bound to execute it; and if executed in a legal manner, the offence of killing him could not be leſs than murder [w].

Perſon killed in executing a warrant upon a civil proceſs.

8. When one man wilfully kills another whilſt he is engaged in executing a ſheriff's warrant, he is entitled to the ſame protection as other public officers. If he be acting under a ſufficient authority,—if he make the neceſſary notifications,—if he

[w] Foſt. 135.

uſe

uſe the proper degree of force;—he is acting legally; and the offence of killing him wilfully is murder. But if the authority under which he acts be inſufficient; if he do not make the neceſſary notifications; or if he uſe a greater degree of force than is neceſſary; he is then acting illegally: and if he be killed by any perſon, it will be either manſlaughter or homicide *ſe defendendo* [x].

A ſheriff's warrant may be directed either to a private perſon or to a public officer; it may be directed to ſeveral perſons, and any one of them may execute it. They may take any private perſons to their aſſiſtance, and if either of them be wilfully killed, it is ſubject to the ſame conſtruction [y].

If the proceſs or warrant be erroneous or informal, without being abſolutely void: as if a *capias* iſſue inſtead of a *diſtringas*; or if it be a common proceſs when it ought to be a *non omittas*; the perſon executing it is conſidered as acting legally, and is entitled to the ſame protection as if the proceſs or

[x] Ante, p. 141, &c. [y] 1 Hale, 459. Foſt. 311.

warrant had been ſtrictly regular[a]. —— The warrant may be executed in any place within the juriſdiction of the ſheriff, or it may be executed either in the day or in the night, on any day except on a Sunday[b]. —— If this warrant be directed to a bailiff who is *jurus et conus*, and he attempt to execute it in the day, and the perſon againſt whom it is iſſued does not know that the bailiff has a warrant againſt him, the bailiff muſt then notify that he intends to arreſt him; but he is not bound to give any notification of his warrant; nor is he bound to ſhew it, although it be demanded: but if it be in the night he is then bound both to notify his intentions, and, if it be demanded, to ſhew his warrant. If the warrant be directed to a private perſon, who is not a bailiff *jurus et conus*, and the perſon to be arreſted does not know that he has a warrant againſt him, this private perſon is then always bound to notify both his intentions and that he has a warrant, and, if demanded, to ſhew it[c]. —— In arreſting a man under a civil proceſs, the bailiff, or perſon to whom

[a] 1 Hale, 457. Foſt. 311.
[b] 1 Hale, 457, 458.
[c] 1 Hale, 458, &c. 2 Hale, 116.

the

the warrant is directed, may lay hands upon the perſon to be arreſted, if he do it gently[d]. —— In executing a writ of poſſeſſion, in taking poſſeſſion under a writ of ejectment, or under the proceedings in a real action; in executing a *capias utlagatum*, a *capias pro fine*, or any other proceſs at the ſuit of the king, the outer doors of a houſe may be broken open; or if the perſon to be arreſted upon any common proceſs be in any houſe except his own, the perſon executing the warrant may break open the doors of that houſe to make the arreſt. If the perſons in the houſe do not know his intentions before he attempts to break open the doors, he muſt notify that he intends it, and muſt demand admittance; but if it be in the day, it is not neceſſary for him to notify, nor to ſhew his warrant, although it be demanded. If it be in the night the bailiff muſt then notify his intentions, and demand admittance, and if it be refuſed he muſt alſo ſhew his warrant. If the warrant be directed to any perſon who is not the bailiff, *jurus et conus*, he is always bound to notify his in-

[d] 2 Hale, 83. Foſt. 271.

tentions, to demand admittance, and, if it be required, to ſhew his warrant. If the perſon to be arreſted ſecure himſelf in his own houſe, and the perſon to whom the warrant is directed get in without breaking the outer door, he may then break open any of the inner doors; but I think he is bound to notify his intentions, to demand admittance, and to ſhew his warrant, in the ſame manner as when he is juſtified in breaking open the outer door[e]. —— If there be a writ of *habere facias poſſeſſionem* againſt a man's houſe and lands, and he pretending it to be a riot, get the conſtable to oppoſe the perſons executing the warrant, the conſtable has no more right to oppoſe them than any other perſon; and if they be acting legally, and the conſtable wilfully kill any of them, it cannot be leſs than murder[f].

Mackally's caſe.

A plaint was entered at the Compter in Wood-Street, againſt James Murray, for a debt of three hundred pounds, at the ſuit of Robert Radford. Fells, one of the ſerjeants

[e] 5 Co. 91. b.
1 Hale, 458, 459.
2 Hale, 117.
Foſt. 319, 320.

[f] 1 Hale, 460.

at

at mace, waited, with three other officers, at Ludgate, to arreſt Murray as he ſhould paſs: and in the evening he ſaw Murray paſſing, and he claſped him in his arms, and ſaid—"I arreſt you in the king's name, at the "ſuit of Mr. Radford:"—he had his mace at his back, but he did not ſhew it. There were ſix perſons in company with Murray, and whilſt he and the ſerjeant were ſtruggling, he looked about, and ſaid to the perſons who were with him—"Draw, draw, "rogues."—The ſerjeant and Murray then fell upon the ground; the ſerjeant was uppermoſt; and whilſt he was in this ſituation, Mackally, one of the perſons who was with Murray, ran up to reſcue him, and ſtabbed the ſerjeant in the back, and it killed him. Mackally, Murray, and another of the party, were tried at Newgate, 8 Ja. and a ſpecial verdict was found. It was referred to the judges, and it was unanimouſly held to be murder[s].

Gardener, an under-bailiff to the dean and chapter of Weſtminſter, had a warrant from the ſheriff, grounded upon a *capias* Pew's caſe.

[s] 9 Co. 64, &c.

out

out of the Common Pleas, to arreſt Pew. Gardener ſaw Pew in the ſtreet, and advanced towards him; and Pew ſeeing this drew his ſword, and ſaid to Gardener—"Stand "off. Come not near me. I know you "well enough. Come at your peril."—Gardener however continued to advance, and when he was in the act of laying hold of him, Pew ſtabbed him with his ſword, and it killed him. He was tried in the King's Bench, 6 Car. and it was held by all the court that he was guilty of murder[h].

Rogers' caſe.

A man, of the name of Rogers, by the help of a gang of deſperate fellows, ſtood out a long time againſt a proceſs out of Chancery, and kept poſſeſſion of the premiſes in queſtion in defiance to the court. At length the ſheriff, attended by the *poſſe comitatus*, went to execute the proceſs, and whilſt they were endeavouring to execute it, three of the *poſſe* were killed by Rogers, or ſome of his gang. He was tried before Lord Hardwicke, at the Summer aſſizes in Cornwall, 1735, and was found guilty of murder[i].

[h] Cro. Car. 183. [i] Foſt. 312.

The

Rrchard Baker's caſe.

The clerk of the County Court in Somerſetſhire, who was the only officer to make out the proceſſes of the court, iſſued a ſummons out of that court, againſt Richard Baker, to recover ſome fees which were due from Baker to himſelf as clerk of the court. Baker did not attend, and the clerk, according to the invariable practice of the office, made out and ſigned an attachment, to attach Baker by his battle goods and chattels, to appear at the next county court. The attachment was delivered to Maggs, an officer of the court; and on the morning it was made out, another officer of the court going by Baker's houſe told him of it; and ſaid that on his return he and Maggs would call and attach him. Baker aſked what he would attach, and the officer anſwered "the clock:"—and upon this Baker ſaid—"You may call and be damn'd, for "I'll be ready for you."—About four o'clock in the afternoon Maggs and this other officer went to Baker's ſhop. The door was divided into two parts, a hatch below, and an upper part which was open; and Maggs put his arm over the hatch to open it. As he was doing this, a woman,

who

who commonly paſſed as Baker's wife, ſeized him by the collar, and endeavoured to prevent his getting in; but he puſhed forward, and got beyond the doorway. Baker was in the ſhop, and immediately called out to the woman,—"Damn you, Bland, "ſtand away."—Maggs then ſaid to Baker, "The attachment is not againſt you; it is againſt your goods;"—but Baker replied, "if you attempt to come one inch farther "I'll ſhoot you."—Maggs, however, made an effort to go forward, and Baker, who was ſtanding about nine feet off, immediately cocked his gun at Maggs. The woman ſtill continued to keep hold of Maggs, and he endeavouring to releaſe himſelf gave her a violent puſh; and at that inſtant Baker fired, and wounded Maggs in the hip. He then went out of the ſhop, and exclaimed—"I am a dead man:"—he walked a few paces, and after languiſhing two days it killed him. Baker looked out of the ſhop, and ſaid—"Damn him, I told him I would "do for him;"—and upon being aſked by a byeſtander how he came to ſhoot the man, he replied—"I would do it again upon the "ſame provocation."—He was tried at the Summer

Summer aſſizes for the county of Somerſet, 1775: and a ſpecial verdict was found. It was referred to the judges, and they were unanimouſly of opinion that the attachment was legal; that in iſſuing it the clerk had acted merely in a miniſterial capacity; that Baker had killed him by unlawfully reſiſting the execution of lawful proceſs; and that he was therefore guilty of murder[k].

But if the name of the parties be miſtaken, either in the proceſs or warrant; or if any of the names be inſerted after it is ſealed, it is void; or if there be any other defect which makes it void, the perſon to whom it is directed cannot be juſtified in executing it[l]. —— A warrant cannot be executed out of the juriſdiction of the ſheriff by whom it was granted: it cannot be executed on a Sunday. —— And if any perſon execute a warrant which is void; if he execute it out of the juriſdiction of the ſheriff; or on a Sunday; he is acting illegally, and forfeits the protection to which officers of

[k] Ca. C. L. 106. Foſt. 312.
[l] 1 Hale, 457, 458,

juſtice

juſtice are entitled[m]. —— If the perſon to whom a warrant is directed attempt to execute it without making the neceſſary notifications;—or without ſhewing his warrant when it is neceſſary;—if he uſe ſuch a degree of force as is likely to kill or to hurt;—if in any of thoſe caſes in which he has a right to break open the doors of a houſe, he make the attempt, without making the neceſſary notifications, without demanding admittance, and ſhewing his warrant when it is neceſſary;—or if he break open a wrong houſe;—in all theſe caſes alſo he is acting illegally[n]. —— If the perſon to be arreſted be within his own houſe, the perſon to whom the warrant is directed can have no power to break open the outer doors of that houſe, and if he attempt it, he is acting illegally; but if a man after he is arreſted make his eſcape, and get into his own houſe, the doors may then be broke open to arreſt him[o].

Sir Henry Ferrers' caſe.

Sir Henry Ferrers, *Baronet*, was arreſted by a ſheriff's officer, under a warrant, in

[m] 1 Haw. 200,
[n] Foſt. 271.
[o] 1 Hale, 458. Foſt. 319, 320.

which

which he was named Sir Henry Ferrers, *Knight*. After he was arreſted the bailiff and one of Sir Henry's ſervants fought, and the bailiff was killed. Sir Henry was tried in the Court of King's Bench, 10 Car. for being concerned in killing the bailiff; and it was held that the bailiff had no authority by that warrant, and that therefore the killing of him could not be murder. But it afterwards appeared that Sir Henry obeyed the arreſt; that the fighting took place after he was in the houſe; and as the offence could not be at all attributed to him, he was acquitted[p].

Marſhall and ſome other bailiffs came with a warrant, upon a *capias ad ſatisfaciendum*, againſt two men, father and ſon. They went into the father's ſtable and hid themſelves all night; and at eight o'clock the next morning, whilſt the houſe was faſtened, and both the father and the ſon in it, the bailiffs came and told them that they had warrants to arreſt them, and commanded them to obey; but the ſon told them to go, and ſaid that they ſhould not come in. Cook's caſe.

[p] Cro. Car. 371.

He

He had a muſquet in his hand, and he alſo told them that he would ſhoot if they attempted to break the houſe. But, notwithſtanding this, they broke one of the windows, they attempted to force the door open, and had actually broke one of the hinges, and the ſon ſhot and killed Marſhall. He was tried at the aſſizes for Somerſet, and a ſpecial verdict was found. It was removed into the King's Bench, 15 Car. and the court were unanimouſly of opinion that it was not murder, becauſe the bailiff in breaking the houſe was acting illegally; but that it was manſlaughter, becauſe he might have reſiſted the bailiff without killing him[q].

A bailiff having a warrant to arreſt a man, preſſed into his chamber, with violence, early in the morning, but did not mention his buſineſs. He did not know the bailiff, nor did he know that he came to arreſt him, and he ſnatched down a ſword that hung in his chamber and ſtabbed the bailiff. He was tried at Newgate, in 1657; the caſe was referred to the judges; and it was held to be manſlaughter. The bailiff

[q] Cro. Car. 537. W. Jon. 429.

omitted

omitted the neceſſary notification, and therefore the offence of killing him could not amount to murder[r].

The ſheriff and under-ſheriff verbally appointed a man to receive writs, make warrants, and return them. A *capias* was brought to him againſt John Stevenſon for debt; and a warrant was made out directed to the ſheriff's regular bailiff, and a blank was left for the attorney for the plaintiff to inſert any perſons he might pleaſe as ſpecial bailiffs. The attorney lived at ſome diſtance from the ſheriff's agent; and when he got the warrant he inſerted the names of James and another as ſpecial bailiffs. James went by himſelf to execute the warrant; Stevenſon was in his own houſe, and James got admiſſion, and made the arreſt; but Stevenſon reſiſted, and compelled him to leave the houſe for fear of his loſing his life. James immediately went to the attorney, who was in a neighbouring houſe, and applied to him for aſſiſtance; and James and the attorney, with ſeveral other perſons as his aſſiſtants, returned immediately to retake him. Stevenſon's caſe.

[r] 1 Hale, 470.

him. As they were approaching the houſe they ſaw Stevenſon going towards it; and James called out—"You may as well ſtay, "for we are coming for you:"—but he went in. James went to one door on one ſide of the houſe, and the attorney and the other perſons went to another door on the other ſide, and the attorney demanded admittance; one of the aſſiſtants put an iron crow under the door, and attempted to lift it off the hinges; and almoſt immediately after Stevenſon took a muſquet loaded with a bullet, and diſcharged it through the door, and killed the attorney. There were two holes in the door, by which Stevenſon might ſee who was on the outſide. It was the practice, and had been ſo for many years, ſometimes to iſſue warrants with the names of the ſpecial bailiffs inſerted in the ſheriff's office before it was ſealed; and ſometimes to iſſue the warrants, with a blank for the names to be inſerted by the parties afterwards. He was tried at Cheſter, April 1759: and it was held that it could not be more than manſlaughter[1].

[1] 10 St. Trials, 462.

10. If

Killing an officer iu defence of a third perſon.

10. If A, who is a private perſon, ſee B in the act of illegally doing any thing which is likely to occaſion the death of C, A, as I conceive, has the ſame power to interfere in the defence of C, whether B be an officer of juſtice or not. When an officer of juſtice is acting illegally, he forfeits the protection to which he would otherwiſe be entitled; and I can find no reaſon why a private perſon ſhould not have the ſame power to prevent an officer from committing a felonious homicide, as he has to prevent any other perſon from committing it. —— If an officer of juſtice be illegally doing any thing likely to occaſion the death of C, and A kill the officer in his defence, it is almoſt impoſſible that it ſhould be juſtifiable; becauſe it is almoſt impoſſible for A to have reaſonable cauſe to ſuppoſe that C's life could not have been ſaved without it: but if there be reaſonable cauſe to ſuppoſe that C's life could not have been ſaved without it, the act of killing the officer is then juſtifiable. —— If A kill the officer, when there is reaſonable cauſe to ſuppoſe that the life of C might have been ſaved without it, A then abuſes the power the law gives him;

and although he merely intend to defend C, yet killing the officer under ſuch circumſtances is criminal and felonious, and A is therefore guilty of manſlaughter. —— Or if A ſeeing the officer acting illegally be provoked by it, and without having any reaſonable cauſe to ſuppoſe that the life of C is in danger, A immediately go up and kill the officer, in this caſe alſo the act thus committed by A is felonious, and he is guilty of manſlaughter[a]: there is nothing like premeditation or deſign: the provocation is in ſome degree coupled with the right which one man always has to defend another: the offence cannot be ſuppoſed to reſult from a vindictive diſpoſition: it is not committed from malice: and it therefore cannot amount to murder. —— But if an officer of juſtice make an attack upon any perſon, and he is acting legally, he is entitled to the fulleſt protection the law can give him; and if any perſon wilfully kill him, the offence cannot be leſs than murder: the perſon killing him may do it in the defence of the perſon attacked by the officer; he may think it is his duty; but he

[a] 1 Haw. 199.

can

can have no right to oppoſe the officer; and no circumſtances, however favourable, can mitigate the offence.

Hopkin Huggett's caſe.

John Berry and two others impreſſed a man, to ſerve in the wars againſt the Dutch; and as they were all walking quietly away together, Hopkin Huggett and three other men went up to them, and deſired them to ſhew their warrant. Berry ſhewed them a paper, and they ſaid it was no warrant, and immediately drew their ſwords. A thruſt was made at Berry, and he and the two other men who formed the preſs-gang immediately drew their ſwords. An affray enſued, and Huggett gave Berry a wound which killed him upon the ſpot. He was tried at Newgate, April, 1666; and a ſpecial verdict was found; and it may, I think, be inferred, that the perſon impreſſed was a ſtranger to Huggett and his party; and that the preſs-gang were acting without a proper warrant. The judges were aſſembled at Serjeant's Inn, three days after they had received copies of the ſpecial verdict; and eight of them delivered their opinion, that, as then adviſed, they thought

it was manſlaughter, and not murder; but they ſaid they would not be bound by it: and Huggett was afterwards admitted to his clergy. The other four judges were of opinion that it was murder[a]. —— In Hale the caſe is reported as follows:—"A, "a preſs-maſter, ſeized B for a ſoldier, and "with the aſſiſtance of C laid hold of him. "D finding fault with the rudeneſs of C, "there grew a quarrel between them, and "D killed C. By the advice of all the "judges, except very few, it was ruled that "this was but manſlaughter[b]." —— It is evident that Berry was acting illegally, and he therefore cannot be conſidered as entitled to the pecular protection which is given to officers. The criminality of the offence is to be determined by the intent of the offender at the time the affray commenced. Huggett's intent at that time was to defend the man impreſſed from an illegal attack which had been made upon his perſon. It was certainly an improper exerciſe of the right which one man has to defend another; but there is nothing which can

[a] Kel. 59. [b] 1 Hale, 465.

ſhew

ſhew that the offence was committed from malice, and it therefore cannot amount to murder.

Tooley's caſe.

" An indictment was found againſt" Tooley and others, " the defendants, for " the murder of one Dent; and, upon not " guilty pleaded, the jury found a ſpecial " verdict; that by a ſtatute made the 27th " Eliz. for the good government of Weſt- " minſter, it is enacted, that, for reforma- " tion of diſorders in that city, the dean, " high ſteward, or his deputy, or two ca- " pital burgeſſes, may hear and puniſh in- " continencies, according to the cuſtom of " London: that, by the cuſtom of London, " any conſtable of any ward, pariſh, or pre- " cinct, may execute his office throughout " the whole city: that within the city, bo- " rough, and liberty of Weſtminſter, it " has been uſed, that every perſon duly ap- " pointed conſtable of any pariſh within the " liberties of the city, borough, and ville " of Weſtminſter, his office of conſtable in " and through the whole city and borough " of Weſtminſter and liberties thereof, has " executed, and uſed to execute: that the

" eighth of March, 8 Ann. &c. three com-
" miſſioners duly appointed by virtue of the
" act for recruiting the army, for putting
" the act in execution, by virtue of that act,
" made their warrant under their hands and
" ſeals, directed to the conſtables of the pa-
" riſh of St. Margaret's, Weſtminſter,
" within the city of Weſtminſter, thereby
" commanding the conſtables, to make
" ſearch within the ſaid city and liberty,
" for perſons within the deſcription of that
" act, which warrant after that day was de-
" livered to the conſtables of the pariſh of
" St. Margaret's, to be executed: that after
" that day Samuel Bray into the pariſh
" of St. Paul's, Covent-Garden, in the city
" and liberty of Weſtminſter, to execute
" this warrant did come, and was: that
" within the pariſh of St. Paul's, Covent
" Garden there was, and is a conſtable be-
" longing to that pariſh: that Bray before
" ſent to Joſeph Dent to aſſiſt him to exe-
" cute the warrant: that after the ſaid eighth
" of March, between eight and nine at
" night, at the ſaid pariſh of St. Paul's,
" Covent Garden, the ſaid Samuel Bray
" ſtaying to execute that warrant, one Anne

" Dekins

" Dekins in the ſtreet, between the play-
" houſe and the Roſe tavern he then and
" there found, whom he ſuſpected to be a
" diſorderly perſon, and then and there as
" a diſorderly perſon, took her into his cuſ-
" tody, as conſtable of the city and liberty
" of Weſtminſter, to carry her to priſon for
" her ſafe cuſtody: that Anne Dekins had
" been before taken up by Bray as conſta-
" ble, as a diſorderly perſon; that at her
" being taken up by Bray the eighth of
" March, ſhe had not miſbehaved herſelf;
" that Bray had no warrant to take or detain
" her: that after the taking of the ſaid Anne
" Dekins, the priſoners (Bray then having
" her in cuſtody) in another place, called
" Covent-Garden, did meet (they being all
" ſtrangers to Anne Dekins) drew their
" ſwords, and aſſaulted Bray, *to reſcue her*
" *from his* cuſtody: that Bray ſhewed his
" conſtable's ſtaff, and declared he was
" about the Queen's buſineſs, and intended
" the priſoner no harm; whereupon they
" put up their ſwords, and Bray carried
" the woman to the round-houſe: that the
" priſoners a little after, the ſaid Anne
" Dekins being in the ſaid priſon in Covent-
" Garden

" Garden aforeſaid, drew their ſwords again, " and aſſaulted the ſaid Bray *on account of* " *the impriſonment of the ſaid Anne Dekins,* " *and to get her diſcharged:* that Bray called " ſome perſons to his aſſiſtance, to keep " her in cuſtody, and to defend himſelf " from the violence of the priſoners: that " Dent came to his aſſiſtance: that while " Dent was in the conſtable's aſſiſtance, and " before any ſtroke, one of the priſoners " gave Dent the mortal wound in the in- " dictment mentioned, of which he died."

—— The caſe was firſt argued in the King's-Bench, and afterwards before all the twelve judges at Serjeant's Inn, Michaelmas, 8 Ann. and it was held, that the power of the conſtable was not greater than it was before the act of the 27th of Eliz.: that the conſtable was acting illegally in apprehending the woman; and that Tooley and the others were guilty of manſlaughter: but five of the judges thought that it was murder[c]. The act thus committed by Tooley and his companions, is an evident abuſe of the right which one man has to defend another; and for this reaſon

[c] L. Raym. 1296.

the

the offence appears to me to be manſlaughter. Their intent was preciſely the ſame as the intent of Huggett and his companions at the time the affray began; and as the criminality of the offence is to be determined by their intention at that time, there can be no reaſon to draw a diſtinction between the two caſes. I do not conceive how the offence of Tooley and his companions can be conſidered as reſulting from malice, and I therefore think that it could not be murder. Whether the conſtable were acting legally or not, was a point which might admit of doubt; and Tooley and his companions at the time they committed the offence, could not know that he was acting illegally; but they took the riſk upon themſelves. If he had been acting legally, nothing could have prevented the offence from being murder, for their intentions, however juſt, would have been no excuſe: but he was acting illegally, and therefore the offence was determinable by their intentions; and although they did not know that the conſtable was acting legally, yet they thought ſo; and as their opinion happened to be correct, they are not more criminal than if they had actually known it.

Mary

Mary Adey's caſe.

Mary Adey lived with a man, of the name of Farmello, in lodgings, in a houſe in the pariſh of Saint Martin in the Fields. One of the conſtables of the pariſh, who had a general ſearch warrant, under the ſtatute of 17 Geo. 2. c. 5. for apprehending idle and diſorderly perſons, went with an aſſiſtant, of the name of Barnet, to this houſe; and they, with the maſter of the houſe, and ſeveral other perſons, went up ſtairs to Farmello's lodging room.—The conſtable knocked at the door; a male voice from within called out—"Who's there?"—and the conſtable anſwered—"It is me."—The door was not opened; but as there was another door, the bolt of which was in another room, this door was opened, and the conſtable and Barnet went in. The conſtable ſaid to Farmello—"You muſt come along with us."—Farmello ſaid—"For what?"—and then Barnet ſaid—"Come, come, you muſt go."—Upon this, and before there was any time for an anſwer, Mary Adey ſtepped in, ſaying—"By G—, he ſhall not go,"—and, with a knife ſhe had in her hand, ſtabbed Barnet under the left arm, and it killed him.

him. She was tried at the Old Bailey, in September, 1779, and a ſpecial verdict was found; and, in addition to the above circumſtances, it was alſo ſtated, as a part of the verdict, that Farmello was not an object within the act of parliament.—It was argued before the judges in the Exchequer Chamber, and it is ſaid that the judges were of opinion that it was manſlaughter: but no deciſion was probably given; and after the woman had been kept in priſon eighteen months ſhe was diſcharged[a].

[a] Ca. C. L. 188.

HOMICIDE,

When the Perſon committing it is engaged upon the Impreſs Service.

WHEN a man is engaged in impreſſing ſeamen for His Majeſty's ſervice, he may lay hands upon the perſon he intends to impreſs; but he ought rather to permit him to eſcape than kill him: and if he kill any man in his attempt to impreſs him, it appears to be ſubject to the ſame rule as when a conſtable kills a man in apprehending him for a miſdemeanor[c].

Rowland Phillips' caſe.

Rowland Phillips was indicted, at the Lent aſſizes at Exeter, 1778, for the murder of William Collier; and a ſpecial verdict was found, which is reported as follows—"An order of council for impreſſing "ſeamen. A warrant made in conſequence

[c] Ante, p. 119.

"of

" of it to Captain Milbank, commander of
" His Majeſty's ſhip the Princeſs Royal,
" who, by indorſement, deputed John Naſ-
" mith, fourth lieutenant of the Princeſs
" Royal, to execute it. That William Col-
" lier, the deceaſed, was a fiſherman: the
" defendant was a midſhipman belonging to
" the Princeſs Royal; and on the 25th of
" September, 1777, was ſent in the brig
" Hope, a tender, commanded by lieuten-
" ant Naſmith, into Torbay, to impreſs
" ſeamen. That he went from the tender
" into a boat, by the directions of the lieu-
" tenant, to put people on board the fiſh-
" ing boats as they returned from ſea, who
" might carry them under the ſtern of the
" tender, that the lieutenant might exa-
" mine whether they had any protections.
" That he put Francis Graham, a quarter-
" maſter, on board the boat or ſmack of
" the deceaſed; that the ſmack, at firſt,
" made a feint of proceeding towards the
" tender; but, inſtead of continuing in that
" courſe, ſhe afterwards put out to ſea, with
" the ſaid Francis Graham on board. That
" Graham then waved his hat, by way of
" ſignal of diſtreſs, and for aſſiſtance: upon

" which

" which the defendant went on board ano-
" ther fiſhing-boat, with the quarter-maſ-
" ter as his aſſiſtant, armed with a muſket
" and ball and two cutlaſſes, and gave chace
" to the deceaſed for three hours; in the
" courſe of which time the defendant fired
" ſix or ſeven ſhots, at the diſtance of a
" quarter or half an hour between each,
" for the purpoſe of bringing the ſmack
" of the deceaſed to. That the hallyards of
" the ſmack had been cut by Francis Gra-
" ham, and that the ſmack was in the act of
" lying to. That, within the diſtance of
" ſixty yards, the defendant fired a muſket
" loaded with ball, the ſea then running
" very high, and ſhot the deceaſed on the
" left ſide of his head. That Francis Graham
" was at that time ſtanding cloſe to the de-
" ceaſed. That the defendant ſaid—'If
' they did not bring to he would fire at the
' man at the helm; but if he could get Gra-
' ham out of the veſſel it might go to hell.'
—" That before the defendant fired the
" muſket, the maſter of the Induſtry fiſh-
" ing-boat deſired him not to fire, but the
" defendant did fire; the deceaſed fell, and
" then one John Deſent ſaid—'You have

'killed a man.'—Upon which the ſaid de-
"fendant ſaid—'Do you think I meant it?'
"That before the laſt firing a ſtruggle was
"ſeen between Francis Graham and the
"deceaſed, and that there was an apprehen-
"ſion Graham would have been thrown
"overboard: that a hat and four bludgeons
"were ſeen floating on the ſea. That the
"defendant fired from a muſket loaded
"with a ball, *as is uſual in the navy, to bring*
"*the ſmack of the deceaſed to, and to hit the*
"*hallyards.*"—The verdict was brought be-
fore the King's Bench; and Lord Mansfield
ſaid—"It is impoſſible, upon this ſpecial
"verdict, to ſay, that the defendant is
"guilty of more than manſlaughter. For
"it is expreſsly found that he fired in the
"uſual manner to bring veſſels to, and to
"hit the hallyards."—Upon this the de-
fendant was immediately arraigned, burnt in
the hand, and diſcharged[a].

[a] Cowp. 830.

HOMICIDE,

When any Perſon engaged upon the Impreſs Service is killed.

THE right of impreſſing ſeamen for His Majeſty's ſervice is now ſo far eſtabliſhed, that a man who is engaged in it is entitled to the ſame protection as an officer of juſtice; and I think it may be ſtated generally, that if a man engaged upon the impreſs ſervice, be acting under a legal warrant, and executing it in a legal manner, and any perſon wilfully kill him, it is murder: but if he be acting under a warrant which is not ſufficient, or if he be executing it in an illegal manner, and any perſon wilfully kill him, it is either manſlaughter, or homicide *ſe defendendo*: in the ſame manner as if he had been an officer of juſtice[f].

[f] Ante, p. 141, &c.

" Captain

Alexander Broadfoot's case.

"Captain Hanway, commander of the "Mortar ſloop, had a warrant from the "Lords of the Admiralty, grounded on an "order of His Majeſty in council, impow-"ering him to impreſs, or cauſe to be im-"preſſed, ſeamen for His Majeſty's ſervice. "The warrant expreſsly directeth," 'That 'the captain ſhall not intruſt any perſon with 'the execution of it, but a commiſſion-offi-'cer; and ſhall inſert the name and office 'of the perſon entruſted on the back of the 'warrant.' "The lieutenant of the Mor-"tar ſloop, (the only commiſſion-officer on "board beſides the captain) was deputed "by him to impreſs according to the te-"nor of the warrant. On the 25th of April, "laſt,"—1743,—"Captain Hanway, being "at anchor in Kingroad, within the port "and county of Briſtol, ordered the ſhip's "boat down the channel, in order to preſs "as they ſhould ſee opportunity. But the "lieutenant ſtaid in Kingroad on board "with the captain. Towards evening the "boat came up with a merchantman, the "Bremen Factor, homeward bound, in that "part of the channel which is within the "county of the city of Briſtol, but ſome

"leagues

" leagues from Kingroad, and ſome of the " crew went on board in order to preſs; " who being informed that one or two of " the Bremen's men were concealed in the " hold, Calahan, with three others of the " boats crew, went thither in ſearch of " them. Whereupon Broadfoot, one of the " Bremen's men (who had before provided " himſelf with a blunderbuſs and piſtols for " his defence againſt the preſs-gang) called " out, and aſked them what they came for: " he was anſwered by ſome of the preſs- " gang — 'We come for you and your 'comrades.' — Whereupon he cried out "—'Keep back, I have a blunderbuſs 'loaded with ſwan-ſhot.' — Upon this the " others ſtopped, but did not retire. He " then cried out, 'Where is your lieu- 'tenant?'—and being anſwered, 'he is not 'far off,' he immediately fired among them. " By this ſhot Calahan was killed on the " ſpot, and one or two more of the preſs- " gang wounded." Broadfoot was tried at Briſtol, in 1743, before the recorder Sir Michael Foſter, and " he was of opinion, " that the boat's crew having been ſent " out with a general order to impreſs, as

" they

"they ſhould ſee opportunity, and having, "in purſuance of that order, boarded the "veſſel without a proper officer, expreſsly "againſt the terms of the captain's warrant, "every thing they did was to be looked "upon as an attempt upon the liberty of "the perſons concerned, without any legal "warrant; and he accordingly directed the "jury to find him guilty of manſlaugh-"ter[s]."

Case of Borthwick, and others.

Lieutenant William Palmer, commander of the Charlotte, a tender, in the ſervice of government, lying off Harwich, received the following warrant from the Admiralty, directed to him. "By the commiſſioners "for executing the office of Lord High Ad-"miral of Great Britain and Ireland, &c. "We do hereby empower and direct you to "impreſs, or cauſe to be impreſſed, ſo "many ſeamen and ſea-faring men, and "perſons whoſe occupations and callings are "to work in veſſels and boats upon rivers, "as you ſhall be able, in order to man His "Majeſty's ſhips, giving unto each man ſo

[s] Foſt. 154.

" impreſſed, one ſhilling for preſt money;
" and in the execution thereof you are to take
" care, that you do not demand or receive
" any money, gratuity, reward, or other
" conſideration whatſoever, for the ſparing
" of any perſon or perſons fit for His Ma-
" jeſty's ſervice, or exchanging or diſ-
" charging any perſon or perſons who may
" be impreſſed; and alſo that every perſon
" acting under you does not demand or re-
" ceive any conſideration whatſoever upon
" the like account, as you will anſwer it at
" your peril. This warrant to continue in
" force till, &c. and in the due execution
" thereof all mayors, ſheriffs, juſtices of
" the peace, bailiffs, conſtables, headbo-
" roughs, and all others His Majeſty's offi-
" cers, and ſubjects whom it may concern
" are hereby required to be aiding and aſ-
" ſiſting unto you, and thoſe employed by
" you, as they tender His Majeſty's ſervice
" and will anſwer the contrary at their pe-
" rils. Given &c." The lieutenant was
the only commiſſioned officer on board; and
upon hearing that a number of ſea-farin
men were at a public-houſe at Ipſwich, h
gave *verbal orders* to a midſhipman, and fi
tee

teen other men who belonged to the tender, to go to the public-houſe, and to impreſs ſuch perſons as they ſhould find to be liable. The midſhipman and his men got there between ten and twelve o'clock at night, and the door being open they went into the houſe. There were ſeveral ſeamen there, and one of them attempting to make his eſcape an affray enſued, and one of the ſeamen in the houſe received a blow upon the head which occaſioned his death; but it was not known by whom it was given. At the Lent Aſſizes for Suffolk, 1779, Borthwick, one of the preſs-gang, was indicted for killing this man; and the reſt of them were indicted for being preſent, aiding, &c. and a ſpecial verdict was found. The warrant was neither backed nor ſigned by any magiſtrate. It was ſtated in the verdict, that it was the conſtant uſage and invariable cuſtom in the navy, for all commiſſioned officers to keep ſuch warrants in their own hands, and to give verbal orders to the petty officers employed, and that the petty officers uſually acted without any other authority. The verdict was removed into the King's Bench; and the court were all of

opinion, that the authority given by the warrant could not be delegated by *parol* to other perſons: and as it was not found who gave the blow; and as the verdict was not accurate in ſtating who was preſent, the priſoners were diſcharged [g].

[g] Doug. 207.

PETIT TREASON.

WHEN a ſervant kills his maſter, or a wife her huſband,—or when a man, ſecular or religious, kills his prelate, to whom he owes faith and obedience,—it is Petit Treaſon; and the offender is puniſhed with death without the benefit of clergy.

Except as to the trial, and method of conviction, petit treaſon is merely conſidered as an aggravated ſpecies of murder, and is in every other reſpect ſubject to the ſame rules. —When a perſon is indicted for petit treaſon, and it does not amount to that offence, the offender may be found guilty of murder; or if there be any circumſtances to mitigate or to juſtify the act, it may be found to be manſlaughter, homicide *ſe defendendo*, homicide *per infortunium*, or juſtifiable homicide in the execution of the law, in the

ſame manner as if he had been indicted of murder[h]. —— If a ſtranger be concerned in the perpetration of the offence, he may be found guilty of murder only: whilſt the ſervant, the wife, or the man who owes faith and obedience to his prelate, is guilty of petit treaſon[i].

1. If a ſervant kill his miſtreſs, the offence is the ſame as if he had killed his maſter, and it is petit treaſon[k].

If a child live with its parent as a ſervant or apprentice, and receive wages or maintenance for its ſervice, he is conſidered as a ſervant; and if he kill his father or mother, he is guilty of petit treaſon: but if he do not live with them as a ſervant or apprentice, it cannot amount to that offence[l].

A ſervant killed his maſter a year after he had left him, from the malice he had againſt him at the time he lived in his ſer-

[h] 1 Hale, 378, 379, 380. 1 Haw. 204. Foſt. 336. 4 Black. 203.
[i] 1 Hale, 379. 1 Haw. 204.
[k] 1 Hale, 380. 1 Haw. 203.
[l] 1 Hale, 380. 1 Haw. 203.

vice,

vice, and it was held that he was guilty of petit treaſon. 33 Ed. 3[m].

2. If a woman kill a man, it cannot be petit treaſon, unleſs ſhe actually be his wife. If they be divorced *cauſa adulterii vel ſævitiæ*, the bond of matrimony is not diſſolved; and if ſhe kill her huſband, it is petit treaſon; but if they be divorced *cauſa conſanguinitatis, vel præcontractus*, the bond of matrimony is diſſolved; or if a man marry again during the life of his firſt wife, this ſecond marriage is void; and if, in either of theſe caſes, the wife kill the huſband, it cannot be petit treaſon[n].

3. If a clergyman, living and beneficed in a dioceſe, kill the biſhop or the metropolitan; or if he be beneficed in two dioceſes, and kill either of the biſhops, or the metropolitans, he is guilty of petit treaſon: but if a clergyman, living and beneficed in one dioceſe, kill the biſhop of another dioceſe, it cannot amount to that offence. When a man is ordained

[m] 33 Aſſ. 7.

[n] 1 Hale, 381. 1 Haw. 205.

by

by a biſhop he owes obedience to that biſhop, and if he kill him it is petit treaſon; but none but eccleſiaſtical perſons owe this obedience; and therefore, if any other perſon kill the prelate of the dioceſe wherein he reſides, it cannot be petit treaſon[a].

[a] 3 Inſt. 20. 1 Hale, 381. 4 Black. 203. 1 Haw. 205.

AN ACT

To take away the Benefit of Clergy for ſome kind of Manſlaughter, 1 *Ja.* 1. *c.* 8.

"TO the end that ſtabbing and killing "men on the ſudden, done and committed "by many inhumane and wicked perſons, "in the time of their rage, drunkenneſs, "hidden diſpleaſure, or other paſſion of "mind, contrary to the commandment of "Almighty God, and the common peace "and tranquillity of this realm, may, from "henceforth, be reſtrained, through fear of "due puniſhment, to be inflicted on ſuch "cruel and bloody malefactors, who here-"tofore have been thereunto emboldened "by preſuming on the benefit of clergy:"

"Be it therefore enacted, that every per-"ſon and perſons which ſhall ſtab or thruſt "any perſon or perſons, that hath not then "any weapon drawn, or that hath not then

" firſt ſtricken the party which ſhall ſo ſtab " or thruſt,—ſo as the perſon or perſons ſo " ſtabbed or thruſt ſhall thereof die within " the ſpace of ſix months then next fol- " lowing, although it cannot be proved " that the ſame was done of malice fore- " thought, yet the party ſo offending, and " being thereof convicted, by verdict of " twelve men, confeſſion or otherwiſe, ac- " cording to the laws of this realm, ſhall " be excluded from the benefit of his or " their clergy, and ſuffer death as in caſe of " wilful murder."

" Provided always, that this act, or any " thing therein contained, ſhall not extend " to any perſon or perſons which ſhall kill " any perſon or perſons *ſe defendendo*,—or " by misfortune,—or in any other manner " than as aforeſaid :—nor ſhall extend to any " perſon or perſons which, in keeping and " preſerving the peace, ſhall chance to com- " mit manſlaughter, ſo as the ſaid man- " ſlaughter be not committed wittingly, " willingly, and of purpoſe, under pretext " and colour of keeping the peace,—nor " ſhall extend to any perſon or perſons

" which,

"which, in chaſtiſing or correcting his "child or ſervant ſhall, beſides his or their "intent and purpoſe, chance to commit "manſlaughter."

What caſes come within this ſtatute, and what do not, whether it be merely declaratory of the common law, or introductory of any new offence, are points upon which oppoſite opinions have been entertained: but I think it may now be ſtated, that no offence can fall within this ſtatute, which is not murder at common law; and that if one man kill another, under the circumſtances which fall within this ſtatute, he may be either puniſhed under the ſtatute, or for murder at common law[r].

1. When one man kills another with any thing which wounds and penetrates, which is held in the hand at the inſtant the blow is given, it is held to be a ſtabbing or a thruſting: and whether it be a blunt or pointed inſtrument, whether it be a ſword, or ſtaff, it is equally within the ſtatute. But if the death be occaſioned by a Stab or thruſt.

[r] Foſt. 298, 299.

blow

blow with any thing which does not wound and penetrate; or if the inſtrument with which the blow is given be not held in the hand at the inſtant it is given; the offence may be murder at common law; but there is no ſtabbing or thruſting, and it therefore cannot be within the ſtatute[b]. —— If one man kill another by ſhooting with fire-arms, by ſending an arrow out of a bow, or a ſtone out of a ſling, it is ſaid to be ſtabbing or thruſting, and that it is within the ſtatute[c]; but I do not conceive how this can be conſidered as law; for it does not come within the common acceptation of either of theſe words, and it is directly contrary to the deciſion which ſays that the inſtrument with which the blow is given muſt be held in the hand.

David Williams' caſe.

Redman, a porter, pointing to a *Jack a Lent* with a leek, which, on St. David's day, was put up in a ſtreet, ſaid to David Williams, a Welchman,—"Look at your coun-"tryman."—Upon this Williams was enraged, and immediately took up a hammer

[b] Foſt. 300; 4 Black. 193, 194.

[c] 1 Hale, 470. Foſt. 300.

and

and threw it at Redman; it miſſed him, but it killed another perſon who was ſtanding near. He was tried at Newgate, 14 Car. 2. upon the ſtatute of ſtabbing, and a ſpecial verdict was found. It was referred to the judges, and they were unanimouſly of opinion that it was not within the ſtatute[d]: and they appear to have have been of this opinion, becauſe the killing of a man by throwing a hammer at him could not be conſidered as a killing by ſtabbing or thruſting[e].

Newman's caſe.

One man directed the point of a ſword againſt another, and threw it at him when twenty yards diſtant, and it ſtruck and killed him. He was tried at the Old Bailey, Oct. 8 Ann. and it was held not to be within the ſtatute[f].

Hath not then any weapon drawn.

2. The object of the ſtatute, in uſing the words—"that hath not then any weapon "drawn,"—appears to have been to prevent the killing of a man when he is unarmed; and it is therefore held, that if a

[d] Jon. Sir W. 432.
[e] 1 Hale, 469.
[f] Foſt. 300.

man

man have any thing in his hand with which he may defend himſelf, it is conſidered as a weapon drawn: and if the perſon killed have in his hand a piſtol, a cudgel, a ſword in the ſcabbard, or any thing elſe, with which he may defend himſelf, the offence of killing him is not within the ſtatute[a]. In caſe of a combat, the perſon killed may have a weapon drawn in his hand at the time it begins, but not at the time he is killed; and whether it be within the ſtatute or not, admits of different opinions[b]: but the crime intended to be puniſhed is the killing of a man who is unarmed; and I therefore think that if he be unarmed at the time he is killed, that the offence is then within the ſtatute.

Hath not then firſt ſtricken.

3. Some words paſſed between Byards and Ward, and Byards ſtruck him, and after ſome more words had paſſed between them, Ward ſtruck Byards, and Byards immediately took a knife and ſtabbed him. He was tried at Newgate, January, 9 Car. and a ſpecial verdict was found. It was refer-

[a] 1 Hale, 470. 1 Haw. 182. Foſt. 300, 301. 4 Black. 194.

[b] Hunter's caſe. 3 Lev. 255.

red

red to the judges, eleven of them were preſent, and ten of them agreed in opinion that it was within the ſtatute, becauſe Byards did not ſtrike the firſt blow; for the words in the ſtatute—"not having firſt "ſtricken"—meant not having given the firſt blow in the affray[c]. But this is thought to be contrary to the ſtatute by two very eminent men, Lord Chief Juſtice Holt[d], and Sir Michael Foſter[e]: the object of the ſtatute, in uſing theſe words, appears to be to prevent the killing of a man unawares: when the perſon killed has time to give a blow it cannot be ſaid that he was killed unawares: and I therefore think, that if a caſe of this kind were to occur again it would receive a different conſtruction: if the perſon killed were to give any blow, whether the firſt or not, the offence of the perſon killing would then, I think, be held not to be within the ſtatute; but if he gave no blow, that then it would be within it.

[c] Ward's caſe. Jon. Sir W. 340.

[d] Ld. Raym. 142.

[e] Foſt. 301.

AN ACT

To prevent the deſtroying and murthering of Baſtard Children, 21 *Ja.* 1. *c.* 27.

"WHEREAS, many lewd women, "that have been delivered of baſtard chil- "dren, to avoid their ſhame, and to eſcape "puniſhment, do ſecretly bury or conceal "the death of their children; and after, if "the child be found dead, the ſaid wo- "men do alledge that the ſaid child was "born dead; whereas it falleth out ſome- "times (although hardly it is to be proved) "that the ſaid child or children were mur- "thered by the ſaid women, their lewd "mothers, or by their aſſent or procure- "ment:"

"For the prevention therefore of this "great miſchief, be it enacted, by the au- "thority of this preſent parliament, that if any

"any woman be delivered of any iſſue of "her body, male or female, which being "born alive, ſhould, by the laws of this "realm, be a baſtard, and that ſhe endeavour "privily, either by drowning or ſecret bu-"rying thereof, or any other way, either "by herſelf or the procuring of others, ſo "to conceal the death thereof, as that it "may not come to light whether it were "born alive or not, but be concealed;—in "every ſuch caſe the ſaid mother ſo of-"fending ſhall ſuffer death as in caſe of "murder; except ſuch mother can make "proof, by one witneſs at the leaſt, that "the child, whoſe death was by her ſo "intended to be concealed, was born "dead."

The object of the act appears to be to make it a crime to endeavour to conceal the death of the child: and it appears to me, that whenever the mother of a child, which, if born alive, would be a baſtard, endeavours to conceal its death, that it may not be known whether it were born alive or not, that the offence is within the ſtatute, unleſs ſhe can prove, by one witneſs at the

leaſt, that it was not born alive. And, as the offence conſiſts in the endeavour to conceal, it appears to be equally within the ſtatute whether the child be born alive or not[f]. —— If a woman confeſs herſelf with child, and ſhe be afterwards delivered unawares, and when no perſon is with her, of a child which is dead, there is nothing which ſhews an endeavour to conceal it, and it therefore cannot be within the ſtatute[g]. —— If a witneſs prove that the child was born before its time, or prove any other circumſtances to ſhew that it was born dead, it is a ſufficient proof, by one witneſs, that the child *was* born dead; and although the mother endeavour to conceal its death, it then is not within the ſtatute[h].

When the child is born alive, there may be inſtances in which the ſame caſe may be either murder at common law, or an offence within the ſtatute: and in ſuch a caſe, it may be admitted, that the ſtatute does not create a new offence[i]. When the child is not born alive, no act committed by the mo-

[f] Kel. 32.
[g] Kel. 33.
[h] 2 Hale, 289.
[i] 2 Hale, 289. Kel. 32.

ther

ther can make her guilty of murder at common law: but it is evident that the concealment of the death of a child, although it be not born alive, may be within the ſtatute; and I therefore think that in ſuch caſes, the ſtatute creates a new offence. When the mother is indicted at common law, it is indiſpenſibly neceſſary that ſome evidence ſhould be given to ſhew that the child was born alive: but when the offence depends upon the ſtatute, I do not conceive how any ſuch evidence can be required[k].

A woman who was with child, went to bed at night, in a chamber by herſelf, free from pain. In the middle of the night ſhe awaked, and finding herſelf in labour ſhe knocked for aſſiſtance, but no perſon came. During the night ſhe was delivered of a child, and ſhe put it into a trunk, and did not make it known until the next night. One woman heard her knock but did not go. There was no appearance of violence having been uſed upon the body of the child. She was tried at Newgate, Auguſt, 16 Car. 2. Lord Bridgman, Sir John Keling, Mr. Juſ- Ann Davis's caſe.

[k] 4 Black. 198.

tice Wilde, and the Recorder were preſent: and it was found ſpecially to have the advice of all the judges, whether her knocking for help exempted her from the ſtatute? But whether it were decided or not, is not ſtated[1].

[1] Kel. 32.

LARCENY.

WHEN a man takes any thing to which he has no right, with a felonious intent, and it is perſonal property, the offence is larceny. If it be above the value of twelve pence it is called grand larceny, and the ſentence of the law is death; but the offender is entitled to the benefit of clergy: if it be only of the value of twelve pence, or under, it is called petit larceny, and the offender is puniſhed by impriſonment or whipping[a].

To conſtitute this offence;—firſt, there muſt be a taking;—ſecondly, it muſt be ſomething to which the offender has no

[a] By ſtat. 4 Geo. 1, c. 11. The court before whom a man is convicted, either of grand or petit larceny, may order him to be tranſported for ſeven years. The puniſhment is alſo altered by ſeveral other ſtatutes; and in ſome caſes the benefit of clergy is taken away.

right;

right;—thirdly, it muſt be taken with a felonious intent;—and, fourthly, it muſt be perſonal property: —— and it is to be obſerved as an invariable rule, that unleſs all theſe circumſtances concur, the offence cannot be larceny.

If a man ſteal goods from different perſons, at different times; as if he ſteal goods of the value of fourpence from A, of ſixpence from B, and of eightpence from C; they are ſeparate offences, and cannot be more than petit larceny [a].

But if he ſteal the goods of any one perſon, at one time, to the value of ſixpence, and at another to the value of eightpence, ſo that together they amount to above the value of twelvepence, and he is indicted for them together, it is the uniform language of the books that it is grand larceny. It however appears to be the preſent opinion, that two petit larcenies cannot thus be put together to make the offence grand larceny: but I do not find that this has received the general ſanction of the judges; and, until it

[a] 1 Hale, 531.

do

do receive this ſanction, it muſt be conſidered as a point which is open to litigation[b].

If the goods of ſeveral perſons be altogether,—as if they be in a bundle,—if they be upon a table,—or in a ſhop,—and they, collectively, exceed the value of twelvepence, and any perſon ſteal them, it is grand larceny, although the value of the property taken from any one of them do not amount to twelvepence[c].

I. *Of the Taking.*

1. When a man entirely removes any thing from the place in which it was, it is held that he takes it: and whether he remove it in the ſlighteſt degree poſſible, or whether he actually carry it away, it in law equally amounts to a taking; and if all the other circumſtances concur, he will be guilty of larceny[d]. If a man take any thing out of a trunk, and lay it upon the floor by

[b] Ca. C. L. 239.
[c] 1 Hale, 531.
[d] 1 Haw. 212.

the ſide of the trunk, and is then apprehended;—if a thief be leading a horſe out of a ground, and is apprehended before he get out;—or if a man take any thing, and he afterwards, by accident, drop it, and leave it in the poſſeſſion of the owner;—yet, in each of theſe caſes, it is held that he is guilty of taking it[e].

A gueſt in an inn got up in the night, and took the coverlid and ſheets from his bed, and carried them into the hall, with an intent to ſteal them. He was going to the ſtable to fetch his horſe, and the hoſtler ſtopped him: and upon the trial it was held that he was guilty of larceny, 27 Ed. 3[f].

Coſlet's caſe. A man got into the Uxbridge waggon, and, after groping about for ſome time upon his hands and knees, he laid hold of a parcel of currants, which were in the fore part of the waggon, and when he had removed the parcel to about the middle of the waggon he was apprehended. He was

[e] Kel. 31. 1 Hale, 508. Lapier's caſe. Ca. C. L. 264.

[f] 27 Aſſ. 39.

tried

tried at the Old Bailey, February, 1782; and was found guilty of larceny. The caſe was afterwards referred to the judges, and they were unanimouſly of opinion, that as the priſoner had removed the property from off the ſpot where it was originally placed, it was a ſufficient taking and carrying away to conſtitute the offence [g].

2. When any thing conſiſts of different parts, and one part of it may be moved without moving the other part from the ſpot where it is, the mere act of moving one part of it, without ſeparating it, is not ſufficient to conſtitute ſuch a taking as is neceſſary to make the offence larceny. If a pick-pocket take a purſe out of a man's pocket, and his keys be tied to the purſe, and they hang to the pocket, and whilſt they are in that ſituation the pick-pocket is apprehended, it is not a ſufficient taking: but if the ſtring had broken, it would have been ſufficient, and he would then have been guilty of larceny [h].

[g] Ca. C. L. 204. [h] 1 Hale, 508.

A man

A man got into a waggon with an intent to ſteal a bale of goods, which lay like a pocket of hops at its length. He had raiſed it upon its end in an upright poſition, and had cut it open with a knife; he was proceeding to take out the goods, and was apprehended before he had taken any out: but he had not removed the bale from the place where he found it. He was tried before Mr. Juſtice Nares; the caſe was reſerved; and the judges were unanimouſly of opinion, that as he had not removed the bale from the ſpot on which it laid, there was not a ſufficient taking, or carrying away to conſtitute larceny [h].

3. When one man takes any thing from another, by making the law the inſtrument by which he carries his deſign into execution, the offence is as much larceny as if he had taken it with his own hands. If A intending to ſteal B's horſe, enter a replevin, and thereby get the horſe delivered to him; if A intending to ſteal B's goods, obtain a falſe judgment againſt him, and thereby get them into his poſſeſſion [i]; or if

[h] Ca. C. L. 204. [i] 1 Hale, 507.

a ſheriff's

a ſheriff's officer tell a man that he is outlawed, when he knows that he is not, and under that pretence take his goods [k]; it is held to be a ſufficient taking, and it is larceny. —— If A deliver any thing to a carrier, and he afterwards ſteal it from the carrier to charge him with the value of it, and he then bring an action and obtain a verdict againſt the carrier, and under an execution take ſome of his goods, he makes the law the inſtrument by which he carries his deſign into execution, and he is clearly guilty of larceny in taking thoſe goods. —— It is ſaid generally, that a man may commit larceny in ſtealing his own goods [l]; but it cannot, as I conceive, amount to this offence, unleſs it fall within the above rule. When a man merely takes his own, and it is not followed by any act by which he takes more than his own; as if A deliver any thing to a carrier, and he ſteal it to charge him with the value of it, without making any ſuch charge afterwards; his intentions are criminal; but he has a right to take what is his own, and whatever be his intentions,

[k] Raym. Sir T. 276. [l] 1 Hale, 513.

they

they do not take away this right[m]: and as to conſtitute larceny there muſt be a felonious act as well as a felonious intent, it cannot, as I conceive, amount to this offence.

A man intending to ſteal ſome cows, went to a ſheriff, and complained that they had been taken from him, and prayed a replevin, and by means of the replevin he got them into his poſſeſſion, and ſold them; and it was held to be larceny. Cited 17 Car. 2[n].

II. *Of taking any Thing to which the Offender has no Right.*

1. A man cannot commit larceny by taking any thing in which he has a property: he may take it to defraud his creditors, and even with a felonious intent, but if he have a right to the property, the act of taking it can never make him guilty of this offence. —— If A take ſome trees belonging to B

[m] Vid. inf. [n] Sid. 254.

and

and cut them into boards, B may take the boards:—if A take ſome cloth belonging to B, and make it into a coat, B may take the coat:—if A take B's coat, and embroider it with lace; or if A take ſome of B's hay, and put it into a hay-cock with ſome of his own; B may take the coat with the lace upon it, or he may take the whole of the hay-cock:—B has a right to take it, and it therefore cannot be larceny, although he do it with a felonious intent. —— If two men be partners, and one of them take the whole of their property, yet it cannot be larceny, although it be with an intent to defraud his partner[n].

2. When a man finds any thing which is loſt, it gives him a kind of property in it, and although he take it with an intent to defraud the owner, or although he take it under circumſtances which ſhew a felonious intent, yet it cannot be larceny. But if a man take any thing, and there be no reaſonable cauſe to ſuppoſe that it is loſt, he then has no right to take it; and if he take it with a felonious intent he will be guilty

[n] 1 Hale, 513.

of

of larceny. If ploughs, or harrows, or any other implements of huſbandry be left in a field,—if any thing be left in a place in which it is uſually kept,—or if a horſe, a bullock, or ſheep, happen to ſtray,—there can be no reaſonable cauſe to conſider it as loſt; a man can have no right to take it, and therefore if he take it with a felonious intent it is larceny. —— When one man hides any thing for the purpoſe of ſecuring or concealing it, and another finds it, who did not know that it was hid, it is to be conſidered as loſt; but if any perſon take it who knew that it was hid, he then can have no right to take it; and if he take it with a felonious intent he will be guilty of larceny *.

Wynne's caſe. A hackney coachman ſet down a gentleman at a houſe in Orchard Street, Portman Square; and every thing belonging to this gentleman was taken out of the coach except a box, which, by miſtake, was left under one of the ſeats. The coachman received his fare and drove away; and in a few minutes after the box was miſſed, and all poſ-

* 1 Hale, 506, 507, 509. 1 Haw. 208.

ſible

ſible means were uſed during the day to diſcover the coach, but without ſucceſs. Hand-bills were diſperſed the enſuing morning, and advertiſements inſerted in the public prints, offering a reward to any perſon who ſhould bring home the box. Two days after two perſons called at the houſe in Orchard Street, and deſired to ſpeak with the gentleman who had loſt the box; but he not happening to be at home, they left the number of the coach in which it had been left, and the nick-name of the coachman. The next morning, as the gentleman was going along Holborn, he ſaw both the coach and the coachman waiting at a door for his fare. The coachman, on perceiving him, immediately ſaid—"Sir, I "and my wife were at your houſe this very "day with the box, but I did not leave it, "becauſe nobody was at home to pay the "three guineas you offered for finding it; "and wanting money very much, I have "carried it to one Michael Mitchel, a jew, "who lives at No. 5, Newcaſtle Street, "Whitechapel."—The gentleman and the coachman immediately went to the jew's houſe, and he produced the box; but on examination

examination it was found uncorded, the haſps broken off; and two bonds with the papers out of ſeveral pocket-books miſſing. The coachman acknowledged that he had uncorded the box, and looked at ſeveral of the things, and that he borrowed eight ſhillings of the jew's wife at the time he left the box. The jew ſwore that the coachmant burnt the bonds; and the coachman ſaid that the jew had burnt them. The coachman was tried at the Old Bailey, April, 1786, before Lord Chief Juſtice Eyre; and he directed the jury, that if they thought he kept the box merely from the expectation that a reward would be offered, they ought to acquit him; but if they were perfectly ſatisfied that he uncorded the box, not merely from curioſity, but with an intention to embezzle any of its contents, it would become a matter of legal conſideration, whether a perſon ſo guilty ſhould be reached as a felon. The jury found him guilty; but the judgment was reſpited, and the caſe ſubmitted to the opinion of the judges. In the following ſeſſions the priſoner was put to the bar, and the recorder informed him that his caſe had been conſidered

dered by the judges, and that they approved of the verdict the jury had given [p].

A lady had been purchaſing ſome calico and ſome flannel, which were tied up in a parcel, and took a hackney coach and put the parcel into it, and as ſhe was getting out at the end of the fare, ſhe ordered the coachman to give the parcel to her ſervant; but he neglected to do it, and drove expeditiouſly away. The parcel was advertiſed, and a reward offered, but without effect. Three days after, another lady who was in the coach at the time, ſaw the ſame coachman with his coach upon a ſtand, and ſhe went to him. He denied all knowledge of her perſon, or of the parcel, or of his ever having had ſuch a fare: but the calico was afterwards found in a box, and the flannel lay upon a bed in the coachman's poſſeſſion. He was tried at the Old Bailey, January 1789, before Sir William Henry Aſhhurſt, and was found guilty of larceny. In the ſeſſions papers there is no evidence that he drove expeditiouſly away: but all that is there ſtated is, that when the lady to whom Sear's caſe.

[p] Ca. C. L. 320.

the parcel belonged got out of the coach, ſhe went into the parlour to ſpeak to ſome company who were waiting there; and that in about two minutes after ſhe returned to the ſtreet door, and ſaw the coach door ſhut, and the window up [q].

3. When the owner delivers any thing to a man, it gives him a right to the poſſeſſion of it; and if he felonioufly convert it to his own uſe, it is in ſome caſes ſufficient to prevent its being larceny, and in others not. If the owner entirely part with the poſſeſſion, and it wholly reſts with the perſon to whom the property is given, nothing which he can afterwards do with it will amount to larceny: he may act illegally, he may convert it to his own uſe, but he has ſuch a right in the property as prevents its amounting to this offence. But if the poſſeſſion of the owner continue, the perſon to whom it is delivered has no right to take it to convert it to his own uſe; and if he afterwards do convert it to his own uſe with a felonious intent, it is larceny, in the ſame manner as

[q] Ca. C. L. 322.

if the property had never been delivered to him.

When the poſſeſſion of the owner continues, and when it does not, is the principal point to be determined. Whenever a man is entitled to the ownerſhip of the property, it is in civil caſes to be conſidered as in his poſſeſſion; and there appears to be a tendency to adopt the ſame rule in the conſtruction of larceny[r]: but until ſuch a deciſion actually takes place, it cannot be admitted as law. If the rule be adopted in its full extent, ſeveral caſes which have been conſidered as frauds, or breaches of truſt, will be larceny *: if it be adopted in part only,

[r] Ca. C. L. 419.

* The diſtinction between larceny and fraud will *then* admit of this explanation. If the owner's right to the property continue, and the perſon to whom it is delivered afterwards convert it to his own uſe with an intent to ſteal it, or to defraud the owner, the offence will always be larceny. But if the owner deliver any thing to a man for a limited time, and his right to the property ceaſes during that time, and the perſon to whom it is delivered during that time feloniouſly convert it to his own uſe, whatever be his intentions, he is guilty of a fraud. If a man without any fraudulent intentions

only, there appears to be no distinction by which a line can be drawn; and then instead of a general rule, every case must be determined according to the peculiar circumstances under which it occurs.

4. When a man without any fraudulent intention buys any thing, and the owner delivers it to him, and he takes it away without paying for it, or without performing his bargain, yet the owner's possession wholly ceases, and this man has such a right to it as prevents him from being guilty of larceny: and if he even keep it with a felonious intent, yet as his intentions were not

intentions hire ready furnished lodgings—if any thing be lent to a man—if any thing be fairly delivered to a man upon pledge—these are instances in which the owner's right to the property ceases for a time; the person to whom it is thus delivered has such a right to it, that whatever he may do with it during that time, it cannot amount to larceny: but if he convert it to his own use with an intent to deprive the owner of his property, it is a fraud.—If a man buy any thing, and it is delivered to him, the owner's right to the property wholly ceases, and however fraudulently the person to whom it is delivered may afterwards conduct himself, it may be considered as a breach of trust, but it can neither be fraud nor larceny.

fraudulent

fraudulent at the time of the bargain, nothing that occurs afterwards can make it amount to this offence.

5. When a man without any fraudulent intention hires any thing for a particular purpoſe, or for a limited time, the owner's poſſeſſion for the time wholly ceaſes; and if the hirer during the time that the hiring continues, feloniouſly convert the property to his own uſe, yet he has ſuch a right to it as prevents him from being guilty of larceny. If a man without any fraudulent intention hire furniſhed lodgings, and during the time for which he has hired them he feloniouſly take away any of the furniture, it is ſubject to the ſame conſtruction: the poſſeſſion of the owner ceaſes for the time; and the hirer has ſuch a right to the property for the time, that he cannot be guilty of larceny *.

A woman hired lodgings and the furniture for three months, and before the expiration of the term ſhe ran away, and took Mary Raven's caſe.

* But it is made larceny by 3 W. & M. c. 9. ſ. 5.

the

the furniture with her. She was tried at the Old Bailey, October 14, Car. 2. Three of the judges, Lord Bridgman, Sir John Keyling, Mr. Juſtice Wylde, and the Recorder, were preſent, and it was held that it was not larceny [t].

Vicar's caſe. A woman hired a furniſhed room, from week to week; and during the fourth week ſhe carried away the furniture. She was tried at the Old Bailey, 1 Wm. & Mary, and a ſpecial verdict was found. It was referred to the judges; and it was held by ſix of them that it was not larceny, but one of them thought that it was [v].

6. When any thing is lent to a man and he takes it out of the owner's poſſeſſion, if, for inſtance, he borrow a horſe to ride out, and after he has got the horſe he form an intent to ſteal him, and ride away with him, the poſſeſſion of the owner for the time he has lent him ceaſes; it is wholly in the poſſeſſion of the perſon to whom it is lent;

[t] Kel. 24. [v] 1 Show. 50.

and

and he therefore cannot be guilty of larceny[w]. But if any thing be lent to a man to uſe upon the premiſes of the owner, the owner does not give up the poſſeſſion. If, for inſtance, a tavern-keeper ſerve a man upon plate, or give him a ſilver cup to drink out of[x], he has merely the uſe of it, and not the poſſeſſion; and if he go away with it with a felonious intent, it is larceny.

7. If one man deliver any thing to another as a gift or preſent, the poſſeſſion and right to the property is wholly veſted in the perſon to whom it is delivered, in the ſame manner as if he had bought it; and nothing which afterwards occurs can make it larceny. If, for inſtance, a woman take the goods of her huſband againſt his conſent, and give them to B, and he knows that it is againſt the huſband's conſent, yet the wife has a right to take them; and as the wife gives them to him, he has ſuch a right to them as prevents him from being guilty of larceny[y].*

[w] 1 Hale 504. 4 Black. 230.

[x] 1 Hale 504, 506.

[y] 1 Hale 514. Harriſon's Caſe, Ca. C. L. 44.

* Taking away a wife againſt her conſent, with the goods of the huſband, is made larceny by ſtat. Weſt. 2. c. 34. 1 Hale 514.

8. If

8. If the owner deliver any thing to a man to take care of for him as a friend, or as a perſon in whom he has confidence, and he afterwards felonioufly convert it to his own uſe, the owner's right to the property continues; but whether it is to be conſidered ſo far in his poſſeſſion as to make the offence larceny does not appear decided. —— If A going out for a few days were to deliver the key of his warehouſe to B, and during his abſence B felonioufly take away ſome of the goods, A gave him the poſſeſſion of the key, but the poſſeſſion of the goods of the warehouſe was not delivered to him, and B is guilty of larceny in the ſame manner as if he had taken them without having had the key [b]. —— But if A deliver the key of a cheſt of clothes to B, and he alſo ſend the cheſt to B's houſe, then both the key and the cheſt are in B's poſſeſſion; and if he felonioufly take away any of the clothes, it then appears to be ſubject to the ſame conſtruction as any other caſe in which the offence is committed by the perſon entruſted by the owner.

9. If one man deliver any thing to another upon pawn, or upon pledge, the

[b] 1 Hale, 505.

poſſeſſion

poſſeſſion is wholly veſted in the pawnbroker or perſon to whom the pledge is made; and if he afterwards go away with the property, or convert it to his own uſe with a felonious intent, yet he has ſuch a right to the property as prevents it from being larceny[c].

10. If any thing be delivered to a carrier, or to a porter,—if any thing be delivered to any perſon to waſh, or for any purpoſe which does not alter the nature of the property, and he afterwards feloniouſly convert it to his own uſe, the owner's right to the property continues; but in this as in the eighth ſection, whether it be ſuch a poſſeſſion as is ſufficient to make the offender guilty of larceny, does not ſeem to be decided. —— I however think, that as applied to carriers it may be conſidered as law, that if a carrier afterwards feloniouſly convert the goods to his own uſe it is larceny; and that it is the ſame offence whether he take the whole that is delivered to him, or whether he only take a part: the point upon which the queſtion turns is, whether the poſſeſſion of the owner continue; and if it

[c] 1 Hale, 513.

be

be ſo much in his poſſeſſion as to make it larceny to take a part, it muſt alſo be ſo much in his poſſeſſion as to make it larceny to take the whole[d]. —— If any thing be delivered to a man for the purpoſe of having it converted into ſomething elſe,—if, for inſtance, a man ſend corn to a mill to be ground,—if a man ſend his cloth to a taylor to be made into clothes,—if any materials be ſent to be manufactured,—and the miller, the taylor, or the manufacturer afterwards feloniouſly convert the whole or any part of the materials ſo delivered to him to his own uſe, it may then admit a different conſtruction[e]: but if it be held that the poſſeſſion of the owner continues, the offender will be guilty of larceny; if it be held that it does not continue in his poſſeſſion it will not amount to this offence. —— If any thing be ſent to a factor, or to an agent, for the purpoſe of ſelling or buying, and he afterwards feloniouſly convert the property, or any part of it, to his own uſe, the offence appears to admit of the ſame conſtruction, and whether it be larceny or not, appears to depend on the

[d] Kel. 83. Vid. Poſt. Div. 3. [e] 13 Ed. 4, 10.[a]

ſame

ſame queſtion as to the continuance of the owner's poſſeſſion. It may, however, be conſidered as the moſt received opinion, that in caſes of buying and ſelling, the poſſeſſion of the owner is not ſuch a poſſeſſion as the law requires to make the factor or agent guilty of this offence, and therefore that an offence thus committed by him does not amount to larceny[e].

One man bargained with another to carry ſome bales of goods to Southampton, and he took them and carried them to another place, and broke open the bales, and feloniouſly took the goods contained in them, and converted them to his own uſe. The caſe was argued in the Star Chamber, and afterwards in the Exchequer Chamber, and the juſtices made their report, that moſt of them were of opinion that it was felony[f]. There have been ſome doubts as to the authority of this caſe; but in conſequence of the conſtruction which has been ſince applied to caſes which fall within the ſame principle, I think that it muſt now be admitted as law.

[e] Watſon's caſe, inf. [f] 13 Ed. 4. 10. a

11. As

11. As to ſervants, it may now be ſtated generally, that property in the hands of the ſervant is conſidered in the poſſeſſion of the maſter: and that if the ſervant convert it to his own uſe, or take it away from his maſter, with a felonious intent, he will be guilty of larceny. —— If a ſervant feloniouſly take any thing whilſt it is in his maſter's houſe, or upon his premiſes, or in any place where it is uſually kept, it has always been held that it is in his maſter's poſſeſſion, and that the ſervant is guilty of larceny. If the butler ſteal his maſter's plate,—if the ſhepherd ſteal his ſheep,—if the apprentice embezzle his maſter's goods, or money out of his ſhop,—it falls within the above deſcription, and it is larceny[f]. —— When a ſervant entruſted with any thing not in the actual poſſeſſion of the maſter went away with it, or converted it to his own uſe, it formerly was not conſidered as larceny: but if a ſervant be ſent out by a gauze-weaver to carry out a parcel of gauzes to a particular place, and he ſell them, and convert the money to his own uſe,—or if a ſervant be ſent out to pay

[f] 1 Hale, 506. 1 Haw. 209.

money,

money, and inſtead of paying it he go off with it,—it has lately been decided that the poſſeſſion of the maſter continues, and that the ſervant is guilty of larceny; and theſe caſes go a great way to ſhew that whenever the maſter's right to the property continues, it in law is conſidered as in his poſſeſſion; and that whenever a ſervant feloniouſly takes any thing which thus continues in the poſſeſſion of the maſter, that then the offence is larceny. I have, however, been favoured with a caſe which may be thought in ſome degree to limit this conſtruction.—A clergyman, a ſurrogate at Everſham, ſent his ſervant with three pounds eighteen ſhillings to buy licences, and he went away with the money with an intent to ſteal it. He was tried at Worceſter Spring aſſizes, 1789, before Mr. Juſtice Heath: the caſe was reſerved for the opinion of the judges, and it was held not to be larceny[g]:—and at a ſubſequent time, when Lavender's caſe[h] was before the judges, it was held that the above caſe was diſtinguiſhable from others; for there the ſervant was commiſſioned to merchandize with the money. But if a ſer- Watſon's caſe.

[g] M. S. [h] Inf.

vant

vant be ſent to a market, and he afterwards feloniouſly convert to his own uſe the property thus entruſted to him, it appears to admit the ſame conſtruction; and if the above caſe be law, the ſervant cannot in this inſtance be guilty of larceny. And it is to be obſerved, that the mere act of buying licences, for which the ſum to be paid is fixed and known, or the act of going to market, may properly be conſidered as a part of the ſervant's duty; and that there appears to be the ſame reaſon to make theſe offences larceny as there is in the caſe of the gauze-weaver's ſervant, or in the caſe of ſending the ſervant to pay money. —— When a man dies, and any thing is left in the poſſeſſion of a ſervant, and he goes away with it with a felonious intent, the caſe is then of a different kind; and whether it be larceny or not may admit of doubt: but the property in the goods immediately veſts in the ordinary or in the executor[1]; and under the conſtruction which caſes of this kind have lately received, I think that the goods in the hand of the ſervant would be conſidered as in the poſſeſ-

[1] 1 Hale, 514.

ſion

ſion of the ordinary or the executor; and I therefore think that the ſervant would be guilty of larceny. It formerly could not have amounted to this offence[k]; and although the act of ſervants in taking the goods of a maſter after his death has been made the ſubject of a particular act of parliament[l], yet I think that the mode of conſtruction which is now generally applied to caſes of larceny, when committed by ſervants, is equally applicable to caſes of this kind. —— If a maſter *lend* his ſervant any thing, and it is taken out of the houſe, or away from the premiſes, and the ſervant go with it, with an intent to ſteal it, the conſtruction is the ſame as if it had been lent to any other perſon. If, for inſtance, a maſter lend his ſervant a horſe, and the ſervant have no fraudulent intention at the time it is lent, and he afterwards felonioufly ride away with him; the maſter wholly parts with the property and poſſeſſion of the horſe for the time he has lent him; the ſervant has a right to the horſe for that time; and he therefore cannot be guilty of larceny.

[k] 1 Hale, 515. [l] 33 Hen. 6, c. 1.

A ſilk-

Silk-weaver's caſe.

A ſilk-throſter employed men to come to work in his own houſe, and he delivered ſilk to one of them to work up, and he ſtole a part of it. He was tried at the Old Bailey, October, 1664, before Lord Chief Juſtice Hyde, Sir John Keyling, and Mr. Juſtice Wylde; and it was held by them to be felony, notwithſtanding the delivery of the ſilk to the workmen; for it was delivered to him to work up, and ſo the entire property remained in the owner[m].

Skutt's caſe.

A letter was ſent to the poſt-office with a five-and-threepenny-piece in it, and one of the ſorters of letters ſtole this letter with the piece of money in it. He was indicted at the Old Bailey, July, 1774, for ſtealing the piece of money. He was tried before Mr. Juſtice Nares, Mr. Juſtice Willes, and Mr. Serjeant Glynn the recorder, and it was held to be larceny[n].

Baſs's caſe.

A gauze-weaver gave his porter a parcel of gauzes to carry to a particular place. As he was going he met two men who perſuaded him to go into a public-houſe to

[m] Kel. 35. [n] Ca. C. L. 100.

drink:

drink: they propoſed to him the ſelling of the gauzes, and he conſented, and ſold them, and received eight guineas of the money. He was tried at the Old Bailey, May, 1782, and was found guilty. The caſe was afterwards referred to the judges, and it was unanimouſly held that the poſſeſſion of the goods continued in the maſter, and that the porter was guilty of larceny[o].

A man ſent his ſervant with forty-two pounds in caſh to be exchanged for bills, but inſtead of carrying the money he went off with it, and converted it to his own uſe. He was tried at Huntingdon Lent aſſizes, 1793, and was found guilty. The caſe was afterwards referred to the judges, and it was held to be larceny[p]. Lavender's caſe.

12. If a man have any thing in his poſſeſſion belonging to another, which was not delivered to him by the owner, but by a third perſon, and he receive it to keep for the owner as a friend, or if he receive it as a carrier, or in the way of buſineſs, or as a

[o] Ca. C. L. 215, 421, 422. [p] M.S.

ſervant, and he afterwards feloniouſly convert it to his own uſe, it was formerly conſidered as a breach of truſt[a]: but in caſes which fall within the ſame principle, a more enlarged conſtruction is now admitted: the right to the property immediately veſts in the owner; and I therefore think, that by implication of law it is to be conſidered as much in the poſſeſſion of the owner as if he himſelf had delivered it to the perſon entruſted; and that if a perſon who is entruſted with any thing be guilty of larceny for converting it to his own uſe, when he receives it from the owner, he is equally guilty of larceny when he receives it from a third perſon.

13. If any thing be delivered to a man for a particular purpoſe, as a friend, as a carrier, in the way of buſineſs, or as a ſervant, and the poſſeſſion of the owner continue, and after that purpoſe is effected the perſon entruſted feloniouſly convert the property to his own uſe, it is larceny, in the ſame manner as if he had feloniouſly converted it to his own uſe before that pur-

[a] 1 Hale, 505.

poſe

poſe had been effected. —— If any thing be lent to a man, or if he hire it, without any fraudulent intentions, for any particular purpoſe, or for any limited time, the poſſeſſion of the owner ceaſes for the time, and whatever the hirer or the borrower may, *during that time*, do with it, he cannot be guilty of larceny: but if he *afterwards* keep it, or convert it to his own uſe, with an intent to ſteal it, then the conſtruction to which it is ſubject may admit of doubt[r]. If it be held that the poſſeſſion of the owner recommence the moment the purpoſe is anſwered, or the time is out, the borrower or the hirer will be guilty of larceny; if the owner's poſſeſſion do not recommence, the borrower or the hirer has then ſuch a right to the property, that it cannot amount to this offence. —— When one man has any thing which belongs to another, and he abſolutely gives up the poſſeſſion of it to the owner, and afterwards takes it again with an intent to ſteal it, then it is larceny; in the ſame manner as if the property had never been in his poſſeſſion[s].

[r] Ca. C. L. 318. [s] 1 Hale, 505.

Tunnard's caſe. One man lent another a mare to ride three miles. It was in the Iſle of Ely, and inſtead of returning he rode up to London and ſold her. He was tried at the Old Bailey, October, 1729, and was found guilty. Lord Chief Juſtice Raymond, Mr. Juſtice Denton, and Mr. Baron Hale, were preſent, and they concurred in opinion that it was larceny. The horſe was lent for a particular purpoſe; and this caſe may therefore be conſidered as an authority to ſhew that the owner's poſſeſſion recommenced the moment the offender relinquiſhed the purpoſe for which the horſe was borrowed [t].

14. It is a rule in law, that the poſſeſſion of the owner of any thing cannot be diveſted by a tortious taking [u]: and therefore if a man buy, hire, borrow, or obtain any thing from another with a felonious intent, yet this does not alter the owner's right to the property; it is ſtill conſidered as in the owner's poſſeſſion; and if the perſon who thus receives the property of another, felonioufly convert it to his own uſe, he is guilty of larceny, in the ſame manner

[t] Ca. C. L. 191. [u] Ca. C. L. 419.

as

as if the property had never been delivered to him. The principal point to be decided is, whether at the time he received the property he intended to ſteal it? For unleſs there be this intent *at that time*, the poſſeſſion of the owner ceaſes, and the perſon to whom it is delivered has a right to take it; and although he afterwards convert it to his own uſe, with an intent to ſteal it, yet it then cannot be larceny. —— When a man obtains *any thing which is perſonal property*, by falſe tokens, or under falſe pretences, with an intent to ſteal it [v], the offence in all caſes appears to me to fall within this rule, and it is now larceny. Formerly it was different [w]; and although there may have been deciſions in which an offence of this kind, committed even with a felonious intent, has been held not to amount to larceny, yet I think that theſe deciſions cannot now be conſidered as law. —— If a man go into Smithfield, under a pretence of buy-

[v] Fraudulently obtaining *money, goods, chattels, jewels, or other things*, by falſe tokens, is puniſhed by 33 Hen. 8, c. 1. Fraudulently obtaining *money, goods, wares, or merchandizes*, by falſe pretences, is alſo puniſhed by 30 Geo. 2, c. 24.

[w] 1 Hale, 506.

ing

ing a horſe, and offer money for one, and the owner give him leave to ride the horſe to try his paces, and he ride away with him, it has been reſolved that it is larceny [x].

Pears' caſe. A man applied to a livery-ſtable keeper for a horſe to go to Sutton, in the county of Surrey, and back again, ſaying that he lodged at No. 25, in King-Street, and ſhould return about eight o'clock at night. He had no lodgings at that place, nor did he return the horſe at night; but during the day he ſold it in Smithfield-market. He was tried at the Old Bailey, September, 1779. It was left to the jury to decide, whether at the time he hired the horſe he had a fraudulent intent to ſell him immediately; they found that he had. The caſe was afterwards referred to the judges, and they were unanimouſly of opinion, that the queſtion as to the original intention had been properly left to the jury; and that as the priſoner's intentions were fraudulent, the parting with the property had not changed the poſſeſſion, but that it remained unaltered in the ſtable-keeper, at the time

[x] Kel. 82.

of

of the converſion, and that the priſoner was therefore guilty of larceny[r].

Major Semple's caſe.

Major Semple hired a poſt-chaiſe of a coach-maker, ſaying he ſhould want it for three weeks or a month, as he was going a tour round the north. In a few days he ſent horſes for the chaiſe, and he went to the Crown and Cuſhion at Uxbridge. He there ordered a freſh pair of horſes, and went to the Duke of Portland's. He returned, and again took freſh horſes at the Crown and Cuſhion, and went away; but it was not known where he went to afterwards, nor what he did with the chaiſe; nor did the coachmaker ſee or hear any thing of him until a twelvemonth after, when he ſaw him in the Compter, in cuſtody for ſome other offence. Major Semple had hired chaiſes from the coach-maker before; and a price of fifty guineas was talked of in caſe he ſhould determine to purchaſe the chaiſe on his return to town: but there was no poſitive agreement. He was tried at the Old Bailey, before Mr. Juſtice Gould, September, 1786. The queſtion as to the

[r] Ca. C. L. 189.

original

original intention was left with the jury; and he was found guilty of larceny [a].

Chiffer's caſe. A man went into a ſhop, and aſked to ſee two cravats, which the ſhop-keeper ſhewed him, and gave into his hands. The ſhopkeeper aſked ſeven ſhillings for them; he offered three, and immediately ran away with the cravats. He was tried in London, 26th of February, 1678; and a ſpecial verdict was found: nothing is ſtated as to the deciſion; but Sir Thomas Raymond, in reporting it, ſtates it as his opinion that he was guilty of larceny [b].

Sharpleſs and Greatrix's caſe. A man, in the character of a ſervant, left a note with a hoſier in Bridge-Street, Weſtminſter, deſiring him to ſend an aſſortment of ſilk ſtockings to his maſter's lodgings, at the Red Lamp, in Queen-Square. The hoſier went according to the direction, and the ſame man opened the door, and ſhewed him into a parlour where his maſter was ſitting, in a dreſſing gown, his hair juſt dreſſed, and rather more powder all over his face than there was any occaſion for. The maſ-

[a] Ca. C. L. 327. [b] Raym. Sir T. 275.

ter

ter looked out three pair of coloured and three pair of white ſilk ſtockings; and then deſired the hoſier to fetch ſome ſilk pieces for breeches, and ſome black ſilk ſtockings with French clocks. The hoſier left the ſix pair of ſtockings hanging on the back of a chair, and went home for the other things; but whilſt he was gone, the maſter and ſervant went off, and the ſtockings were taken away, and were afterwards pawned by the maſter. The hoſier told the maſter that the ſtockings were fourteen ſhillings a pair; but there had been no poſitive agreement to purchaſe them. Both the maſter and the ſervant were indicted at the Old Bailey, May, 1772, and they were found guilty. The caſe was referred to the judges; and it was held that the whole tranſaction manifeſted an original and preconceived deſign to obtain a tortious poſſeſſion of the property; and that the conviction was right[b].

A man ordered a ſilverſmith to ſend a pair of ſilver candleſticks to his lodgings. They were ſent with a bill of parcels, and

[b] Ca. C. L. 88.

he

he contrived to ſend the ſervant back, and to keep the candleſticks. The jury found that he ordered the candleſticks with an intent to ſteal them: the caſe came before the judges, and it was held to be larceny. Cited in 1786, as a caſe lately determined [c].

Cockwaine's caſe.

A man went into a hatter's ſhop, and deſired him to carry ſome hats home to a merchant in the neighbourhood who was known to the hatter, for him to look at. The hatter went to the merchant's houſe, but he was not at home; and whilſt he was gone the ſame man returned to the ſhop, and ſaid to a ſervant man in the ſhop—"Your maſter is at our houſe, and has ſent me, and ſays, you muſt give me the cocked hat and round hat that are in the window."—He had received no ſuch order, but the ſervant-man gave him the two hats, and he immediately went away with them. He was tried at the Old Bailey, December, 1788, before Mr. Juſtice Wilſon; the jury found that he took the hats with a felonious intent to convert them to his own uſe: a ſpecial caſe was afterwards drawn up, and re-

[c] Ca. C. L. 331.

ferred

ferred to the judges; but no opinion was ever given; and the priſoner was afterwards pardoned. The act of taking the hats is tortious, they are to be conſidered as in the poſſeſſion of the owner; and I therefore think that the offence is larceny[d].

A hoſier's apprentice was carrying two parcels of ſtockings to a Mr. Heath's; and a man met him and aſked him where he was going, and he told him. The man immediately produced a ſmall parcel, which was afterwards found to contain nothing but old rags, and told the apprentice that this parcel was for his maſter; and, under falſe pretences, he got him to exchange: the apprentice took the parcel of rags, and the man took the two parcels of ſtockings, and went away with them. He was tried at the Old Bailey, April, 1789. The jury were of opinion that he contrived to make the exchange with an intent feloniouſly to obtain and convert the ſtockings to his own uſe, and they therefore found him guilty of larceny. The caſe was referred to the judges; and ten of them being aſſembled, Wilkins' caſe.

[d] Ca. C. L. 296.

they

they were unanimouſly of opinion that the conviction was right [c].

Patch's caſe. The proſecutor was walking in the ſtreet, and Patch and two other men joined company with him, and after walking a ſhort ſpace of time, one of them ſtooped down and picked up a purſe which contained a ring; and a receipt for one hundred and forty-ſeven pounds, purporting to be the receipt of a jeweller for a rich brilliant diamond ring. Patch propoſed that they ſhould go into ſome public houſe, to conſider in what manner their reſpective portions in this valuable prize ſhould be divided: and accordingly they all went into a houſe on Saffron Hill. Various modes of diſtribution were ſuggeſted: at length Patch aſked the proſecutor, if it would be agreeable to him to take the ring into his own poſſeſſion, and to depoſit his money and watch as a ſecurity to return it, upon receiving his portion of the value. The proſecutor aſſented, and ſigned a written agreement, that when Patch, or either of the other men returned the watch and mo-

[c] Ca. C. L. 417.

ney,

ney, and ſeventy pounds, he would deliver them the purſe and the ring. Patch beckoned the proſecutor out of the room under the pretence of ſpeaking to him in private; and during this interval the two other men went off with his watch and money. The abrupt manner in which they went off ſuggeſted to the proſecutor that he had been defrauded, and he ſecured Patch. The ring was valued at ten ſhillings. Patch was tried at the Old Bailey, February 1782, before Mr. Juſtice Gould: Mr. Baron Perryn, and Mr. Juſtice Buller were preſent. It was referred to the jury to conſider whether it was not an artful preconcerted ſcheme in the three men feloniouſly to obtain the proſecutor's watch and money: and he was found guilty of larceny [f].

Aickles' caſe.

Mr. Edwards ſent his clerk to Mr. Aickles, a money lender at the weſt end of the town, to inquire whether he would diſcount a bill for one hundred pounds; and requeſted him to call in the city that he might be ſatisfied as to its validity. Aickles immediately came with the clerk to the

[f] Ca. C. L. 206.

houſe

houſe of the acceptor of the note in Corn-hill; he was there ſhewn into a room to Mr. Edwards, who aſked him the terms upon which he would diſcount a good bill for one hundred pounds, for two months; and Aickles ſaid that he would do it for two and a half per cent. agency, excluſive of the legal intereſt. Mr. Edwards immediately delivered to him a bill for one hundred pounds, and referred him to the acceptor who was preſent; and the acceptor ſaid that the acceptance was his hand-writing. Aickles then addreſſing himſelf to Mr. Edwards ſaid, "If you will go with me to "the weſt end of the town, to Pulteney "ſtreet, I will give you the caſh." Mr. Edwards could not go, but he deſired his clerk to go, and not to loſe ſight of him, nor leave him without receiving the money: and he promiſed to follow them himſelf in half an hour. Aickles and the clerk went to Aickles' lodgings in Pulteney ſtreet, and Aickles ſhewed him into a room, and deſired him to wait whilſt he fetched the money: and he ſaid, "It is only three ſtreets off, "and I ſhall be back in a quarter of an "hour." The clerk, however, followed him

him down Pulteney ſtreet, but in turning the corner of Brewer ſtreet loſt ſight of him. He then walked backwards and forwards in the ſtreet waiting for him for ſome time, and during this interval Mr. Edwards came up, and then they both went to Aickles' lodgings; and either one or the other waited there three days and three nights, but he did not return. In a few days after he was apprehended at the houſe of a lady in Margaret ſtreet; he expreſſed his ſorrow for what had happened; he made ſeveral apologies for his conduct, and promiſed to return the bill: but before the trial it was diſcovered that the bill was in a ſtate of negociation. He was tried at the Old Bailey, January, 1784. The jury expreſly found that he had a preconcerted deſign to get the note into his poſſeſſion with an intent to ſteal it, and they gave a verdict of guilty. The caſe was afterwards referred to the judges; and as the jury had found a preconcerted deſign to ſteal the note, they were unanimouſly of opinion that he was legally convicted [s].

[s] Ca. C. L. 239.

III. *Of*

III. *Of taking with a felonious Intent.*

When a man takes any thing with an intent to ſteal it, or with an intent to defraud the owner, it in general amounts to what in law is called a felonious intent: and there are but few caſes in which there can be any difficulty in deciding whether the offence be committed with this intent or not [h].

When a man thinks that he has a right to the poſſeſſion of any thing, and under that ſuppoſition takes it, whether he have that right or not, there can be nothing from which it can be implied that he took it with a felonious intent, and it therefore cannot amount to larceny. —— If a horſe come upon a man's ground, and he take him as a treſpaſſer, or a ſtray, without having any right to take him [i]; —if a man's creditors were by any contrivance to get his property into their poſſeſſion, and he were to take it away from them before it was appropriated or diſpoſed of; —if a ſeizure were made of

[h] 4 Black. 232. [i] 1 Hale 506, 509.

ſmuggled

ſmuggled goods, and the ſmugglers to whom they belonged were to get them away from the perſon who had the cuſtody of them [k]; —theſe are inſtances in which the act of taking the property may be illegal: but it does not imply a felonious intent, and it therefore cannot be larceny. —— The felonious intent muſt exiſt at the time of the taking; and therefore, if a man firſt get the intire poſſeſſion of any thing, without having any ſuch intent, it cannot be larceny, whatever he may do with it, or whatever intentions he may afterwards have.

When a man takes any thing to which he has no right, and without having any pretence or excuſe for taking it, the act of taking it of itſelf ſhews that his intent is felonious. But if there be any pretence or excuſe, ſomething more is then neceſſary; if, for inſtance, one man take another's harrows which are left in a field, and uſe them; if a man go upon a common and ride one horſe to catch another [l], it cannot be implied that it was done from a criminal intent: and in all caſes of this kind, unleſs

[k] 2 Barns. 174. [l] 1 Hale, 509.

he afterwards do any act to make it his own, or to deprive the owner of his property, there can be no evidence of a felonious intent; and then the mere act of taking the property cannot amount to larceny.

When any thing is delivered to a friend,—or to a carrier,—when any thing is delivered to a man in the way of his buſineſs,—or to his ſervant,—and the poſſeſſion of the owner continues, there can be no evidence of a felonious intent; nor can the perſon entruſted be guilty of larceny, unleſs he do ſome act to make the property his own, or to deprive the owner of it. In all caſes of this kind the poſſeſſion of the owner continues until the moment that the perſon entruſted converts the property to his own uſe; it is then that the act of taking is held to be committed; and as the felonious intent evidently exiſts at that time, it falls within the rule which ſays, that the felonious intent muſt exiſt at the time of the taking. —— But if any thing be delivered to a carrier to take to one place, and he take it to another, it may be a mere miſtake, and unleſs he afterwards unpack it, or do ſome

act

act which implies that he intends to convert it to his own uſe, there is nothing to ſhew that his intent is felonious, and he therefore cannot be guilty of larceny [l]. —— If a ſervant take his maſter's horſe to ride out; or if a ſervant be negligent, or miſchievous, and waſte any thing, in theſe caſes alſo, there is nothing which implies a felonious intent, and therefore the ſervant cannot be guilty of larceny [m].

When a man in extreme want of food or clothing ſteals any thing to relieve his immediate neceſſities, he may intend to make the owner a compenſation when it is in his power, and it then cannot be implied that there was an intent to ſteal it, or to defraud the owner, which in moſt other caſes conſtitutes what is meant by the words felonious intent. But it is probable that in all caſes in which theſe words are uſed, the law means nothing more than that the intent muſt be unjuſt: an intent to ſteal any thing, or to defraud the owner, is felonious becauſe it is unjuſt: and if a man take any perſonal property to which he has no right, with an intent that is unjuſt, it appears to me to fall

[l] 1 Hale, 504. [m] 1 Hale, 509. Dalt. 368.

within the ſame principle; and I therefore think that the offence is larceny. If a man in extreme want of food or clothing take any thing for his immediate relief, there *poſſibly* may be circumſtances notwithſtanding all the proviſions made by the law, under which his life may be in danger without taking it: this cannot, then, be conſidered as a criminal act; his intentions are not in ſuch a caſe unjuſt; and he therefore cannot be guilty of larceny. But every man even when reduced to an extremity of this kind, may in almoſt all caſes be relieved by applying to the pariſh officers; and therefore if a man take any thing when he may have this relief, he can have no right to take it: and although to make it amount to this offence, there muſt be a criminal intent, as well as a criminal act; and although there poſſibly may be inſtances in which there is nothing which can imply ſuch an intent; yet in general the act itſelf will ſhew that the intent is unjuſt, or in other words, will ſhew that it is felonious, and whenever it does ſhew this intent, the offender is guilty of larceny.

IV. *Of*

IV. *Of taking perſonal Property.*

There are three kinds of things, the taking of which cannot, under any circumſtances, amount to larceny;—firſt, the taking of any thing which is conſidered as real property;—ſecondly, the taking of a choſe in action;—and, thirdly, the taking of particular beaſts, birds, and fiſh: in the firſt claſs, the offence is not larceny, becauſe it is neceſſary to conſtitute this offence, that what is taken be *perſonal* property; in the two others it is not larceny, becauſe, as applied to this offence, the value of what is taken is by the common law held to be too unimportant to be conſidered as property. —— But if a man take any thing which does not fall within one of theſe claſſes, it is conſidered as perſonal property; and if all the other circumſtances neceſſary to conſtitute this offence concur, the offender is guilty of larceny.

1. Every

1. Every thing which is a part of the land, which is growing upon it, or fixed to it, and every thing which concerns the realty, is conſidered as real property:—and therefore if a man dig up any ore [a], ſtones, gravel, or ſand, and take it away;—if he take any corn, graſs, vegetables, trees, or any of the fruit which is upon them, buſhes, ſhrubs, or any thing which is growing [b];—if he take any thing which is fixed to a building [c], or the rails, fences, or any thing which is fixed to the ground [d];—or if he take any deeds, or papers, which relate to the land;—it is not perſonal property; and therefore the perſon taking it cannot be guilty of larceny. —— When a box or trunk is uſed for the ſole purpoſe of keeping deeds or writings, which relate to land,

[a] Offences committed in black-lead mines are puniſhed by 25 Geo. 2. c. 10.

[b] Robbing orchards, by 43 Eliz. c. 7.—Offences committed upon trees, &c. by 6 Geo. 1. c. 16—9 Geo. 1. c. 22—29 Geo. 2. c. 36—6 Geo. 3. c. 36.—6 Geo. 3. c. 48—13 Geo. 3. c. 33. Deſtroying madder roots, by 31 Geo. 2. c. 35. Stealing vegetables, by 13 Geo. 3. c. 32.

[c] Stealing lead, iron, &c. affixed to a dwelling-houſe, by 4 Geo. 2. c. 32.

[d] Breaking hedges, by 43 Eliz. c. 7.

and

and any perſon ſteals the box with the deeds or writings in it, the whole is conſidered as belonging to the realty; it is not conſidered as perſonal property; and it therefore is not larceny [c].

When any thing which is a part of the land is dug,—when any thing growing is cut or gathered,—when any thing fixed to a building is ſeparated from it;—or when any thing fixed to the ground is taken up, it then becomes perſonal property; and if any man then come and take it away, it is larceny, in the ſame manner as if it had always been perſonal property. If the act of ſeparating the property from the ſoil be done by the offender himſelf, and he ſeparate it at one time, and go at any other time to take it away; as, if a man go and take ſome lead off a church, or houſe, and he go again in an hour afterwards to take it away, it is larceny, in the ſame manner as if it had been ſeparated by any other perſon. But if he both ſeparate it and take it away, without leaving it, and returning to it again, it is

[c] 1 Hale, 509, 510. 1 Haw. 214.

conſidered

conſidered but as one act: what he takes is then conſidered as real property, and it is not larceny [f].

A man ſtole ſix boxes, containing charters and muniments concerning the inheritance of land. The caſe was referred to the judges, and it was held that it was not larceny [g].

Weſtbeer's caſe. A man ſtole a commiſſion out of Chancery to ſettle the boundaries of a manor, and the return to it. He was indicted at the Old Bailey, January, 1739, and a ſpecial verdict was found. The commiſſion and the return were upon two ſeparate pieces of parchment, and the jury, in their verdict, ſtated them to be of the value of one penny each. It was removed into the King's Bench; and after two arguments, the court were unanimous, that the parchment writings concerned the realty, and that therefore the priſoner was not guilty of larceny [h].

[f] 1 Hale, 510. 1 Haw. 214.
[g] 10 Ed. 4, 14.
[h] Str. 1133. 2 Seſſ. Ca. 378. Ca. C. L. 12.

2. Bonds,

2. Bonds, bills, notes, and every writing which gives a right to perſonal property, is conſidered as a choſe in action; as applied to this offence it is not conſidered as property, and if any perſon ſteal it, yet he cannot be guilty of larceny[1].

3. If a man ſteal any bullocks, cows, calves, ſheep, lambs, pigs, horſes, mules, aſſes, or any other animal which is tame, and kept for food or for ſervice;—if any of them be killed, and any man ſteal the ſkin, the fleſh, or any other part of them;—or if a man milk a cow and ſteal the milk, or pull the wool off a ſheep's back, or the hair out of a horſe's mane or tail;—it is perſonal property, and if he ſteal it he is guilty of larceny. —— But dogs and cats are held to be property of an inferior kind; it is thought too unimportant to give them the ſame protection as perſonal property; and if any perſon ſteal a dog or a cat it cannot amount to larceny[1]. Stealing tame animals.

[1] Dyer, 5. 1 Haw. 214. 4 Black. 234. It is made larceny by 2 Geo. 2. c. 25.

[1] 1 Hale, 511, 512. 1 Haw. 214, 216. Dog-ſtealing is puniſhed by 10 Geo. 3. c. 18.

A man

A man milked a cow, and took away the milk to ſteal it. The caſe was reſerved by Mr. Juſtice Bathurſt, and it was held to be larceny; becauſe it would be larceny to ſteal the cow itſelf [m].

Martin's caſe.

A man pulled ſome wool from the bodies of ſixteen lambs, whilſt they were living, and in ſome places tore away the ſkin with it. He was tried at Northampton Lent aſſizes, 1777: the caſe was reſerved; and the judges were unanimouſly of opinion that it was larceny;—"and the principle "they went upon was, that where larceny "may be committed of the thing itſelf, it "may alſo be committed of the produce of "that thing [n]."

Stealing wild animals.

If a man ſteal any deer [o], hares, rabbits [p], or any other animals *feræ naturæ*, which may ſerve for food, and are reclaimed or confined, ſo that they may be taken at pleaſure, they are conſidered as perſonal property, and he

[m] Ca. C. L. 159.
[n] Ca. C. L. 158.
[o] Deer-ſtealing is puniſhed by 9 Geo. 1, c. 22. and 16 Geo. 3, c. 30.
[p] Rabbit-ſtealing is puniſhed by 3 Jac. 1, c. 13.—22 & 23 Car. 2, c. 25.—9 Geo. 1, c. 22.—and 5 Geo. 3, c. 14.

is

is therefore guilty of larceny[q]. —— If a man kill any animal of this kind, whether it be wild or reclaimed, it is conſidered when dead as perſonal property; and if any perſon ſteal it, or any part of it, he is guilty of larceny[r]. —— But if they have their liberty;—if deer be in a park;—or hares or rabbits in a warren; they are then not conſidered as perſonal property, and if any of them be ſtolen it cannot amount to this offence. Animals which are *feræ naturæ*, and not uſed for food, are conſidered as an inferior claſs; they are in no caſe conſidered as perſonal property; and whether an animal which falls within this deſcription be confined or at large, the act of ſtealing it cannot amount to this offence[s].

Stealing birds.

Tame birds of every deſcription, which are uſed for food, are conſidered as perſonal property; and if any of them be ſtolen the offence is larceny: or if a man ſteal any wild birds which are uſed for food, and are reclaimed or confined, ſo that they may be

[q] 1 Hale, 511. 1 Haw. 215. 4 Black. 235.
[r] Stanf. 25. b.
[s] 1 Hale, 511, 512. 1 Haw. 214, 215.

taken

taken at pleaſure, it is the ſame offence. But if a wild bird which is uſed for food be at large, it is not conſidered as property, and the ſtealing of it cannot be larceny. —— If a man keep ſwans upon any private water, and any perſon ſteal any of them, whether they be marked or not, they are conſidered as property, and it is larceny: if a ſwan be marked and pinioned, and it go at large, yet, in conſequence of being marked and pinioned, it is conſidered as property; and if it be ſtolen by any perſon he is guilty of larceny: but if a ſwan be at large, and neither marked nor pinioned, and it is ſtolen, it is not property; and therefore the ſtealing of it cannot amount to this offence. —— If a man find the eggs of any tame bird uſed for food, in any place in which he cannot have reaſonable cauſe to conſider them as loſt, and he take them, it is larceny: but if there be reaſonable cauſe to conſider them as loſt, he has then ſuch a right to take them that it cannot amount to this offence. If a man find the eggs of any wild bird uſed for food, and which is reclaimed or confined, and he find them in ſuch a place as ſhews that they are become

become private property, and he take them, it is larceny: but he may take the eggs of any wild birds which are at large; and if he have reaſonable cauſe to ſuppoſe that they are the eggs of a wild bird which is at large, nothing criminal can be imputed to him. If a man find the eggs of a ſwan, and he has reaſonable cauſe to ſuppoſe that they are the eggs of a ſwan which is private property, and he ſteal them, it is larceny: but if there be reaſonable cauſe to ſuppoſe that it is a wild ſwan, it cannot amount to that offence. —— The moment a man kills any wild bird which is uſed for food, or as ſoon as it gets into his poſſeſſion, it becomes his property; and if any perſon ſteal it, he is guilty of larceny. —— All birds which are not uſed for food, except ſome kinds of hawks, are not conſidered as property, and whether they be wild or tame, or however valuable, the ſtealing of them cannot be larceny. If a perſon take a hawk which cannot be uſed for hunting, whether it be wild or tame, it is ſubject to the ſame rule as the taking of any other wild bird not uſed for food: or if he take a hawk which is unreclaimed, although it may be uſed for hunting,

hunting, yet it is ſubject to the ſame rule. But if a hawk, which may be uſed for hunting, be reclaimed, it is conſidered as property; and if any perſon ſteal it whilſt it is in the owner's poſſeſſion, he is guilty of larceny: if it fly away, and a perſon, who has reaſonable cauſe to ſuppoſe that it is a reclaimed hawk, ſteal it, in this caſe alſo he is guilty of larceny: but if he have no reaſonable cauſe to ſuppoſe that it is reclaimed, it is the ſame as taking a hawk which is unreclaimed, and it cannot amount to this offence. —— If a man ſteal the eggs of any bird not uſed for food, they are not conſidered as property, and it therefore cannot be larceny: and if the eggs of a hawk which is uſed for hunting be ſtolen, it is ſubject to the ſame conſtruction[t].

A went into a pigeon-houſe and ſtole twenty young pigeons: they were held to be the property of the owner of the pigeon-houſe, becauſe he could take them at any time, and it was held to be larceny[v].

[t] 1 Hale, 511, 512. 1 Haw. 215, 216. 4 Black. 235. 3 Inſt. 110.
[v] 18 Ed. 4, 8. a.

A man

A man ſtole ſome peacocks; and it was held by all the judges that it was the ſame offence as ſtealing hens or capons, geeſe or ducks, which are the property of the owner[x].

When fiſh are at large in a river, or in any other water where they cannot be taken at pleaſure, they are not conſidered as property. But fiſh in a trunk, in a net, or in any other place where they may be taken at pleaſure, are conſidered as property, and if any perſon ſteal them the offence is larceny[i]. Stealing fiſh.

[x] 18 H 8, 2. a.

[i] 1 Hale, 511. 1 Haw. 215. Stealing fiſh is puniſhed by 5 Eliz. c. 21.—22 & 23 Car. 2, c. 25.—4 & 5 W. 3, c. 23.—9 Geo. 1, c. 22.—and 5 Geo. 3, c. 14.

FINIS.

Ex. L. a. a.